

# Exhibit A

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

CHARLENE DZIELAK, et al., :

:

:

Plaintiffs, : CIVIL ACTION NO.

: 2:12-cv-00089-KM-SCM

vs. :

:

:

WHIRLPOOL CORPORATION, :

LOWE'S HOME CENTER, SEARS :

HOLDINGS CORPORATION, THE :

HOME DEPOT, INC., FRY'S :

ELECTRONICS, INC., AND :

APPLIANCE RECYCLING CENTERS:

OF AMERICA, INC., :

:

Defendants. :

Videotaped deposition of COLIN B. WEIR,  
taken by and before Lisa Forlano, CCR, CRR, RMR, at  
the offices of Bursor & Fisher, P.A., 888 Seventh  
Avenue, New York, New York, on Friday, April 22,  
2016, commencing at 9:19 a.m.

Job No. CS 2236911

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25

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1 (Declaration of Colin B. Weir dated  
2 December 28, 2015 was marked Weir-1 for  
3 identification.)

4 (Declaration and Expert Report of J.  
5 Michael Dennis, Ph.D. was marked Weir-2 for  
6 identification.)

7 (Declaration and expert report of  
8 Dr. R. Sukumar dated December 28, 2015 was  
9 marked Weir-3 for identification.)

10 VIDEO OPERATOR: We are now on the  
11 record. Please note that the microphones are  
12 sensitive and can pick up whispering or your  
13 private conversations and just please keep  
14 your cellphones away from the microphones as  
15 they can cause interference. Recording will  
16 continue until all parties agree to go off the  
17 record.

18 My name is Drew Cerria, representing  
19 Veritext Corporate Services. The date  
20 today is Friday, April 22, 2016. The time  
21 is approximately 9:19 a.m.

22 Today's deposition is being held at the  
23 law firm of Bursor and Fisher, P.A.,  
24 located at 888 Seventh Avenue, New York  
25 City, 10019.

1           And today's deposition is being taken  
2           by counsel for the defense. The caption of  
3           today's case is Charlene Dzielak, Shelley  
4           Baker, Francis Angelone, Brian Maxwell,  
5           Jeffrey Reed, Kari Parsons, Charles Beyer,  
6           Jonathon Cohen, Jennifer Schramm and  
7           Aspasia Christy on behalf of themselves  
8           versus Whirlpool, Lowe's Home Center, Sears  
9           Holding Corporation, The Home Depot,  
10          Incorporated, Fry's Electronics,  
11          Incorporated and Appliance Recycling  
12          Centers of America.

13          This case is being held in the United  
14          States District Court in the District of  
15          New Jersey. The case number is  
16          12-CV-0089-KM-JBC.

17          Our witness today is Mr. Colin B. Weir.

18          And at this time if our attorneys will  
19          identify themselves, their firms and the  
20          parties they represent, after which our  
21          reporter, Ms. Lisa Forlano, also of  
22          Veritext will swear in Mr. Weir and we will  
23          begin.

24          MR. DECKANT: This is Neal Deckant from  
25          Bursor and Fisher, representing Plaintiffs.

1 And I'm joined today by Anthony Vozzolo of  
2 Vozzolo LLC.

3 MR. LOGAN: This is Cedric Logan of  
4 Wheeler Trigg O'Donnell, and I'm representing  
5 Defendants Whirlpool, Lowe's, Sears and Fry's  
6 Electronics.

7 COLIN B. WEIR, having been duly sworn,  
8 was examined and testified as follows:

9 BY MR. LOGAN:

10 Q Okay. Mr. Weir, good morning.

11 A Good morning.

12 Q Good to see you again.

13 A A pleasure.

14 Q You've been deposed many times; is that  
15 correct?

16 A That's true.

17 Q So I'm going to skip some of the  
18 formalities. Is there any reason you can't give  
19 truthful testimony today?

20 A I don't think I'll have any problem  
21 giving truthful testimony today, although I will  
22 note that I am just returning to my firm from an  
23 extended paternity leave, and more than usual I may  
24 ask you to help refresh my recollection with  
25 documents since it's been some time since I've

1 thought about some of these issues.

2 Q Well, congratulations on your -- your  
3 paternity.

4 A Thank you.

5 Q And that's no problem. We will take  
6 all the time we need in order to make sure that  
7 you -- your -- your recollection is sufficiently  
8 refreshed so that you can give accurate testimony.

9 A Thank you.

10 Q And if you need a break, just let me  
11 know. Just try to give me a maybe five-minute heads  
12 up so that I can wrap up any series of questions.

13 A Okay.

14 Q Okay. Some of this background material  
15 we have covered in other cases, but just so I have a  
16 clean record in this case I'll want to cover it  
17 briefly here.

18 Did you attend college?

19 A I did.

20 Q And where was your undergrad?

21 A I attended the College of Wooster,  
22 W-O-O-S-T-E-R.

23 Q And what year did you graduate?

24 A 2003.

25 Q And what was your major?



1 A Business economics.

2 Q Business economics. And did you have  
3 any minors?

4 A I did not.

5 Q And what was your GPA?

6 A I don't remember the precise amount,  
7 but I graduated with cum laude honors.

8 Q Okay. Describe business economics for  
9 me, just the nature of what you studied.

10 A It was a traditional economics program  
11 that focused more on business issues, including  
12 accounting, marketing, product development and then  
13 some of the more traditional economic type of topics  
14 like statics, progression analysis. I think that's  
15 a broad level. I don't think that's every class I  
16 took, but --

17 Q You studied microeconomics?

18 A Yes.

19 Q Supply and demand and the nature of  
20 prices?

21 A Yes.

22 Q Okay. Does any of the study that you  
23 did as an undergraduate inform your work on this  
24 case?

25 A Sure. I think it underpins the basics

1 of my background and experience as an economist.

2 Q You would describe yourself as an  
3 expert in economics?

4 A I would.

5 Q You would describe yourself as an  
6 expert in statistics?

7 A Yes.

8 Q Now, I -- I note in your report -- and  
9 for the record, why don't we just go ahead and say  
10 we have three exhibits pre-marked which have been  
11 given to you. Exhibit 1 is a copy of your  
12 Declaration in this case.

13 Exhibit 2 is a copy of the Declaration  
14 and expert report of J. Michael Dennis, Ph.D. And  
15 Exhibit 3 is a copy of the Declaration and expert  
16 report of Dr. R. Sukumar.

17 MR. DECKANT: Cedric, I don't believe I  
18 have a copy of Exhibit Number 3.

19 MR. LOGAN: My apologies. Sukumar, let  
20 me get that for you.

21 MR. DECKANT: Thank you.

22 BY MR. LOGAN:

23 Q Now, I note in your report you rely on  
24 the declarations of Drs. Dennis and Sukumar. That's  
25 a fair characterization?

1           A           I would say I rely on them in part.

2           Q           And what is the name of the survey  
3 technique used by Dr. Dennis?

4           A           Contingent valuation method. Just  
5 sometimes abbreviated as CVM.

6           Q           Okay. Contingent evaluation.  
7 And same question for Dr. Sukumar.

8           A           Dr. Sukumar relies on a survey  
9 technique known generally as conjoint analysis, and  
10 in particular he used a subset of the conjoint  
11 methodologies known as ASEMAP, all caps A-S-E-M-A-P.

12          Q           You obtained your MBA, correct?

13          A           That's correct.

14          Q           And what was the name of your college?

15          A           I went to Northwestern University for  
16 that degree.

17          Q           And I know that Northwestern University  
18 MBA program, there's various types of programs.  
19 There's night school. There's day school. There's  
20 telecommuting. What was the nature of your  
21 enrollment at Woost -- at Northeastern?

22          A           Some of the classes were day classes.  
23 Some of the classes were evening classes, but it was  
24 a pre-requisite of the program that you maintain  
25 full-time employment while you are taking your

1 degree. So I was continuously employed at my  
2 current firm, Economics and Technology, while I was  
3 earning that degree.

4 Q And was there a particular  
5 concentration that you studied in the course of  
6 getting your MBA?

7 A I don't think there was a particular  
8 concentration offered per se, but the program  
9 covered traditional business and economic concepts  
10 like accounting, marketing, finance, economics,  
11 statistical analysis. There were classes, for  
12 example, in conjoint analysis, in marketing,  
13 innovation, human resources, business law.

14 Q Did you study contingent valuation in  
15 the course of your education?

16 A I don't know whether Northeastern  
17 included any contingent valuation studies. Some of  
18 my undergraduate studies involve what's known as AB  
19 testing, which uses the same techniques as  
20 contingent valuation from a statistical perspective;  
21 although I don't know that you would call it in the  
22 context valuation in the context that I used.

23 Q Well, I'll -- I'll ask you some more  
24 questions about Dennis and Sukumar later on to make  
25 this record, but just generally, did you evaluate

1 and scrutinize their reports so that you knew that  
2 you could rely on them, or did you more just take it  
3 as a given that they're qualified and they did a  
4 good job on their reports?

5 A I would say it's a mix of both. I have  
6 relied on having worked with both of these experts  
7 in other proceedings before, their stated  
8 credentials, but I myself, I would consider myself  
9 to have expertise in both contingent valuation  
10 methodology and conjoint methodology and have been  
11 accepted as an expert as such by various courts.  
12 And so I made some investigation as to the  
13 methodologies used by both Dr. Sukumar and  
14 Dr. Dennis to give myself comfort that they have, at  
15 least on the face of things, applied those  
16 methodologies in a way that I would find reasonable  
17 myself.

18 Q Did you do a -- a rigorous review of  
19 their methodology?

20 A Tell me what you mean by "a rigorous  
21 review."

22 Q For example, did you examine the  
23 underlying data that they collected and ensure that  
24 they did the calculations correctly?

25 A I did examine, I believe, the

1 underlying datasets of both experts. I don't think  
2 I fully reproduced all of their calculations.

3 Q So sitting here today, you don't  
4 personally guarantee that everything contained in  
5 the Sukumar and Dennis reports is 100 percent  
6 accurate; is that fair?

7 A I don't know whether it's fair or not.

8 Q Well, would you swear under oath that  
9 everything contained in the Dennis report is  
10 accurate?

11 A No, I have not conducted sufficient  
12 investigation into the Dennis report to basically  
13 adopt it as my own testimony.

14 Q And same question for Sukumar.

15 A Same answer.

16 Q I want to talk about your expertise in  
17 both conjoint analysis and contingent valuation.  
18 Why don't we start with conjoint analysis. Can you  
19 describe for me what conjoint analysis is?

20 A Conjoint analysis is a very broad  
21 discipline of survey research that can be used for  
22 any number of reasons. But the reason that it's  
23 being used here and a common application of the  
24 technique is to determine the value or premium  
25 associated with a particular product attribute.

1           And conjoint analysis, again, at a high  
2     level here because the discipline is pretty broad,  
3     relies on survey tasks that either involve ranking  
4     or choosing or ordering various either product  
5     profiles or product attributes or mixes thereof in  
6     order to, after a subsequent statistical evaluation,  
7     determine, at least in this case, the value of an  
8     attributed question; namely the value of the Energy  
9     Star as it was applied to the Maytag Centennial  
10    washing machines involved in this litigation.

11           Q       What is the most common use of conjoint  
12    analysis in the academic world today?

13           A       Again, I know that the discipline is  
14    quite broad. I'm not sure that I could identify for  
15    you what the most common application would be. But  
16    I -- I think it relates generally to what's been  
17    done here, which is that it seeks to determine  
18    the -- the value of various product attributes.

19           Q       Okay. Have you ever conducted a  
20    conjoint analysis in your career?

21           A       Yes.

22           Q       How many times?

23           A       I have permanently individually  
24    conducted several conjoint studies, probably more  
25    than five, less than 10. Although as i sit here

1 today I'm not sure I have the exact number. But  
2 I've also been involved in team efforts that have  
3 looked at the design and implementation of various  
4 conjoint studies. In addition to that, again, many  
5 times, maybe as many as 10 or 20.

6 Q So before the five to ten conjoint  
7 analyses that you have conducted yourself, were  
8 those for the purposes of litigation or for some  
9 other purpose?

10 A Well, I guess I should provide a little  
11 bit more clarity. Some of them were part of my  
12 educational experience where in training for the  
13 technique we then put the rubber to the road and  
14 actually ran conjoint studies. Some of them have  
15 been for private clients. And in a couple of  
16 litigation instances, I have specified how I would  
17 perform a conjoint study, but have not yet actually  
18 run that conjoint study.

19 Q And so what -- the -- the reports here  
20 did not merely propose a method, but they actually  
21 carried it out; is that correct?

22 A That's correct.

23 Q Have you, in litigation, done something  
24 similar with respect to conjoint analysis? Have you  
25 carried it out and had it scrutinized by a court?



1           A           Again, I've been involved with teams of  
2 people that have done so, but I'm not sure that I  
3 have you ever done that by myself.

4           Q           Have you ever published any academic  
5 articles on conjoint analysis?

6           A           I'm not in the business of publishing  
7 academic articles, so, no, I have not.

8           Q           Have you ever taught any classes on  
9 conjoint analysis?

10          A           I don't believe so, no.

11          Q           Have you ever been asked to review a  
12 conjoint analysis as part of a peer-review process  
13 for an academic journal?

14          A           Again, that's beyond the scope of the  
15 services that my business provides, so the answer is  
16 no. Although, again, I have enough experience with  
17 conjoint that I would feel comfortable performing  
18 that analysis, if necessary.

19          Q           All right. Well, now I'm going to ask  
20 you questions about contingent valuation. I believe  
21 that you said that you did study, or did not, I'm  
22 sorry, contingent valuation in your education?

23          A           Contingent valuation, to me, is one  
24 flavor of something that I was taught as AB testing,  
25 which is the comparison of one thing versus another

1 using statistical methods, and in the contingent  
2 valuation method you're collecting the data for the  
3 comparison from a consumer survey. So, again, I  
4 believe I have the educational background for the  
5 technical underpinnings of that, but I was not  
6 taught the methodology by the name "contingent  
7 valuation method."

8           However, I consider myself a lifelong  
9 learner and I have been involved with contingent  
10 valuation method on the job for 10 years now. So  
11 it's something that I have been immersed with and  
12 focused and studied professionally now for sometime.

13           Q       Have you carried out a contingent  
14 valuation analysis yourself?

15           A       I think -- I think many, if not all, of  
16 the times that I've been involved with a contingent  
17 valuation study that has been run from --  
18 100 percent from beginning to end has been as part  
19 of a team. I have, in several litigations,  
20 specified how -- specified the details of a  
21 contingent valuation method, but I'm awaiting court  
22 approval before I've been asked to go forth and run,  
23 actually collect the survey data, which would be the  
24 final step.

25           Q       And have you ever taught any classes on

1 contingent valuation?

2 A Again, I'm not a professor, so I  
3 haven't had the opportunity to do so.

4 Q And you've never published an economic  
5 article on contingent valuation?

6 A Again, I'm not in the business of  
7 publishing articles, so I have not.

8 Q Now, there are various types of  
9 contingent valuations we've discussed; is that  
10 correct?

11 A I'm not sure that we have discussed  
12 that there are various types of contingent  
13 valuation.

14 Q Well, for example, you mentioned ASEMAP  
15 being one methodology?

16 A That's a conjoint methodology.

17 Q My conjoint, my -- my apologies. Well,  
18 then why don't we talk about conjoint again just for  
19 a minute.

20 A conjoint analysis could be -- the  
21 results of that analysis, that could be biased in  
22 various ways due to problems with the survey design  
23 or execution; is that correct?

24 A I -- I don't quite understand that  
25 question. Could you try again, please?

1           Q       Sure. Any survey, regardless if it is  
2 contingent or conjoint or some other methodology,  
3 can have biased results in various ways due to the  
4 design or the execution of the survey; is that  
5 correct?

6           A       I wouldn't say that all surveys have  
7 bias. In fact, most of them are designed to not  
8 have bias.

9           Q       What are some of the ways that a survey  
10 designer could check against possible biases?

11          A       I don't understand what you mean by  
12 "check against bias."

13          Q       If an academic was interested in  
14 minimizing bias, for example, in a survey technique,  
15 how would they go about doing that?

16                   MR. DECKANT: Objection.

17                   THE WITNESS: I think most of the work  
18 to minimize bias is done in the survey design  
19 phase, and that's done by the selection of and  
20 drafting of the survey questionnaire.

21 BY MR. LOGAN:

22          Q       There are academic articles and books  
23 regarding how to minimize bias in survey design; is  
24 that correct?

25          A       You know, I've read so many articles

1 about survey and so many books, I -- I assume that  
2 topic is covered. I don't know if there are  
3 articles or books that address solely that one  
4 topic, but perhaps.

5 Q Have you ever had any education  
6 regarding the use of contingent valuation to  
7 determine the price premium for a consumer good?

8 Let me rephrase that. A price premium  
9 for a particular attribute of a consumer good.

10 A I think that's the only way in which  
11 I've ever used contingent valuation methods. So I  
12 would say all of my only experience with contingent  
13 valuation method is -- is in the use of the  
14 technique in that manner.

15 Q Have you ever had any education on the  
16 use of conjoint analysis to determine a price  
17 premium for a particular attribute of a consumer  
18 good?

19 A Absolutely.

20 Q And this is just the experience that  
21 we've been discussing so far?

22 A No. I had an entire graduate level  
23 course that focused on the implementation of  
24 conjoint surveys and, in particular, how to value a  
25 particular attribute that you're studying. As well

1 as you've mentioned additional on-the-job education  
2 and training and use of these techniques.

3 Q Have you ever conducted a consumer  
4 survey yourself?

5 A Yes.

6 Q And how many times?

7 A Dozens. Maybe more.

8 Q And was that for litigation or for  
9 other purposes?

10 A Both.

11 Q How many for litigation?

12 A As I sit here today, I don't know. I  
13 can't recollect.

14 Q When you are conducting a consumer  
15 survey, is it important to get a sufficient number  
16 of respondents in order to ensure the validity of  
17 the results?

18 A It depends tremendously on the context  
19 and goal of the survey.

20 Q So what does the phrase "margin of  
21 error" mean to you within context of conducting a  
22 consumer survey?

23 A At least in some surveys, the goal of  
24 the survey is to get information from a sample  
25 population that you then wish to project to

1 the total population or the universe, and the margin  
2 of error gives you some indication about the  
3 statistical accuracy of the estimate from the  
4 sample. So you might typically see plus or minus  
5 6 percent margin of error, which would indicate that  
6 the sample estimate could vary slightly from the  
7 point estimate of the sample itself.

8 Q As a general matter, is it the case  
9 that the more respondents you have in a survey the  
10 lower margin of error you have?

11 A There may be exceptions, but I think  
12 generally all else equal the bigger the sample, at  
13 least up to a certain threshold, the smaller the  
14 margin of error. At a certain point you have a  
15 sufficiently large sample that there really isn't  
16 improvement by gaining additional sample size.

17 Q So there is not a linear relationship  
18 between sample size and margin of error?

19 A You know, I've never plotted that out.  
20 So I don't know if, over the portion, where there is  
21 a direct relationship between those two things,  
22 whether that's linear or not, but I can tell you  
23 that at some point the gains either become deminus  
24 or zero.

25 Q Is there a level of -- let me rephrase

1 this.

2 Is there a point at which in a survey  
3 result the margin of error becomes too large that  
4 the survey result is not considered to be sound?

5 A I don't believe there's a bright line.  
6 It would, again, depend tremendously on the purpose  
7 and goal of the survey and the particular facts and  
8 circumstances underpinning that survey.

9 Q So, for example, in a presidential  
10 poll, a survey with a margin of error of plus or  
11 minus 25 percent would not be that interesting, it  
12 would not tell us a lot of things about what the  
13 voters were preferring?

14 A Is that a hypothetical you're  
15 suggesting?

16 Q Yes.

17 A Without more details about what that  
18 survey was trying to illicit and what the results of  
19 that survey were, I can't answer that question.

20 Q Do you have any experience or  
21 background in analyzing home appliance energy  
22 efficiency tests?

23 A Yes.

24 Q And what is the nature of that  
25 background?



1           A           I've served as an expert, both a  
2     testifying expert and consultive expert on, I think  
3     five or more projects that have involved analyzing  
4     Energy Star or energy efficiency of major household  
5     appliances and looking at test results from -- from  
6     those particular engagements. The typical types of  
7     tests are also usually derived from public policy  
8     regulations, and I have substantial background in  
9     analyzing regulations and statutes, particularly as  
10    they relate to economic or statistical measures.  
11    And so I have the ability to interpret a set of  
12    rules for how to conduct a test and for whatever  
13    underpins that test and to understand how it should  
14    be conducted and how to interpret the results of  
15    that test.

16           Q           So you are familiar with the Federal  
17    Government's test procedures for Energy Star?

18           A           I would say that this is an area where  
19    I probably couldn't recite all of those details from  
20    memory, but if we put the regulations out there, I  
21    am -- they are unfortunately complicated, but I  
22    think I could very easily walk you through them,  
23    given enough time.

24           Q           Do you have any experience or  
25    background in predicting the useful life of an

1 appliance?

2 A I've certainly studied that issue  
3 enough times that I feel very comfortable analyzing  
4 the work of other people who have made that  
5 calculation. I personally have not derived that  
6 calculation myself, but I've seen sources from --  
7 industry sources. I've seen company-specific  
8 sources. This is something I'm very familiar with.

9 Q But you're not an engineer; is that  
10 correct?

11 A I'm not an engineer, but I feel very  
12 comfortable looking, for example, at survey results  
13 that have made a determination of the average useful  
14 lifespan of an appliance. I feel I have the  
15 expertise necessary to analyze that kind of data.

16 Q Have you ever analyzed -- analyzed  
17 actual testing of appliances in order to determine  
18 their useful life?

19 A I don't quite follow that question.

20 Q So, for example, I know that there are  
21 some groups out there that will run tests of  
22 appliances where they open and close the door to the  
23 appliance thousands of times or run a cycle of the  
24 appliance thousands of times in order to determine  
25 useful life.

1                   Have you ever examined that sort of  
2                   data?

3                   A           Again, what do you mean by "that sort  
4                   of data"? What is the result that you're talking  
5                   about? What is the data?

6                   Q           Have you examined and scrutinized any  
7                   tests designed to predict the useful life of an  
8                   appliance?

9                   A           That question just isn't any more clear  
10                  to me. What I've said to you before and would say  
11                  again is that the results of analyses to determine  
12                  the average useful lifespan, those I have seen and  
13                  understand how to interpret those results. If  
14                  you're asking about something different, then I'm  
15                  not following you.

16                  Q           Well, I would -- let me see if I can  
17                  draw a line between an engineering experiment  
18                  designed to determine the useful life of a  
19                  particular product versus a survey where people are  
20                  asked how long would you expect a particular product  
21                  to last. Have you analyzed one or the other or both  
22                  of those types of analyses?

23                  A           Again, I think I have seen the results  
24                  of -- I've analyzed the results of those types of  
25                  surveys. I haven't gone back and analyzed, for

1 example, how an engineer opened and closed the door  
2 a thousand times.

3 Q Okay. Other than your work in this  
4 case, do you have any experience or background in  
5 evaluating the efficiency of clothes washers?

6 A Beyond the walls of the cases that I've  
7 worked on specifically as it relates to measuring  
8 these energy efficiency damages as I've done here,  
9 I've conducted a fairly broad study of the Energy  
10 Star program and the energy usage that goes into  
11 various appliances. So I don't know how to  
12 categorize that experience, but this was not my  
13 first time considering the issue of a washing  
14 machine and how washing machines use energy and how  
15 they qualify for the Energy Star. I was aware of  
16 that and had reviewed other studies of energy use  
17 and Energy Star certification as it relates to  
18 washing machines.

19 Q Sure. Just to clarify the question.  
20 I'm -- I'm aware that you have worked on other  
21 Energy Star cases, but the question is, do you  
22 have -- other than your work on this case, do you  
23 have any experience or background in evaluating the  
24 efficiency of clothes washers?

25 A And what I'm suggesting to you is that

1 separate and apart from the cases that we're talking  
2 about, I have conducted independent study to have a  
3 better understanding of Energy Star appliance  
4 efficiency and how to make those measurements, and  
5 that has included analysis of clothes washers.

6 Q Well, I -- I think I'll need more  
7 detail on this independent study of the energy  
8 efficiency of clothes washers. So tell me what --  
9 outside of the context of this case, what  
10 independent study have you conducted to evaluate the  
11 energy efficiency of clothes washers?

12 A Some of the efforts have been  
13 duplicated here in this case, but it's involved an  
14 analysis of the Federal regulations that govern the  
15 energy efficiency standards of clothes washers,  
16 reviewing other peer-reviewed studies that have  
17 addressed the energy efficiency of clothes washers,  
18 looking at elements relating to Energy Star  
19 certification of clothes washers. I -- I consider  
20 that part of my background, experience, my 12 to 13  
21 years of experience that I bring to bear here today.

22 Q When did you commence your independent  
23 study of the energy efficiency of clothes washers?

24 A I would say that my study of Energy  
25 Star and energy efficiency as it relates to

1 appliances has been ongoing for several years. I  
2 couldn't tell you the date that I first gave that  
3 consideration be, but three years or more I would  
4 say.

5 Q And what was the purpose of this  
6 independent study?

7 A To educate myself and provide myself  
8 with the necessary tools to evaluate the energy  
9 efficiency of various appliances, to make a  
10 determination about Energy Star certification and to  
11 have a general understanding of those topics.

12 Q Well, this case was filed in 2012. Did  
13 you, at any point prior to the filing of this case,  
14 conduct an independent study as to the energy  
15 efficiency of clothes washers?

16 A Again, I don't remember the precise  
17 date, but I can state with certainty that my studies  
18 predated my engagement in this case, which was not  
19 as early as 2012.

20 Q When you -- when you speak of this  
21 independent study, you have -- have phrased it in  
22 terms of studying Energy Star and Federal  
23 regulations. Was there a particular emphasis on  
24 clothes washers at any point prior to your  
25 engagement in this case?

1           A           Again, my studies were of appliances  
2           generally, and there were particular elements that  
3           were specific to clothes washers and particular  
4           elements that were specific to, say, refrigerators  
5           and these things are related, so it made sense to  
6           study them together.

7           Q           What particular elements of -- about  
8           clothes washers stood out to you at that time?

9                       MR. DECKANT: Objection.

10                      THE WITNESS: I don't quite understand.

11                      That seems very broad.

12           BY MR. LOGAN:

13           Q           The -- you said that -- you -- I  
14           believe that you said that there were particular  
15           elements about clothes washers that you studied as  
16           part of your independent study in the -- in this  
17           case -- before this case. And so I'm just asking  
18           what were those particular elements about clothes  
19           washers that you recall studying?

20           A           I think you've -- I apologize if I've  
21           miscommunicated, but it seems that you've  
22           misunderstood what I indicated to say, which is that  
23           parts of my study related to clothes washers and  
24           parts of my study related to other appliances.  
25           Those fields of study to me are -- they go hand and

1 hand, and so it makes sense to conduct those studies  
2 together.

3 But what I remember about the issues  
4 relating to the energy efficiency of clothes washers  
5 are things about electrical usage as it relates to  
6 operating the machine, using hot water, drying  
7 clothes, how to convert various Federal standards  
8 like the energy factor or water use factor into  
9 energy equivalent units, such as kilowatt hours or  
10 therms of natural gas. Again, many of the things  
11 that I have been able to bring to bear in this case.

12 Q It seems from your description that  
13 your study was mainly focused on the Federally  
14 regulated laboratory tests of clothes washers; is  
15 that correct?

16 A I don't know that that's a -- a  
17 reasonable characterization. I would say that  
18 that's an element that I certainly studied, but how  
19 washing machines operate and use energy is something  
20 that I understand independent from how, for example,  
21 the Federal Government, the U.S. Department of  
22 Energy, which as I go on today I'll probably just  
23 abbreviate as DOE, how the DOE might test those  
24 things. I think those are related but independent  
25 topics that I have an understanding of.



1           Q           So there's a difference between how the  
2           DOE would measure the energy consumption of the  
3           clothes washer in a laboratory and how a consumer  
4           would use it in their home?

5                   MR. DECKANT: Objection.

6                   THE WITNESS: That's definitely not  
7           what I intended to impart with my previous  
8           answer. What I had intended to suggest was  
9           that you can have an understanding of how  
10          clothes washers operate and use energy. For  
11          example, electricity to spin the -- the  
12          clothes or energy to heat hot water,  
13          independent of how the DOE might conduct  
14          testing. But I understand the purpose of the  
15          DOE testing to provide information that is  
16          directly applicable to consumer use of the  
17          products.

18          BY MR. LOGAN:

19          Q           And this last phrase in your previous  
20          answer that the purpose of the DOE testing is to  
21          provide information to consumers that is useful,  
22          what do you base that statement on?

23          A           There are a lot of things. I think the  
24          most obvious one is the process by which we've wound  
25          up here today, which is that the DOE tests

1 appliances and can make a determination about  
2 whether or not they appear to be Energy Star  
3 qualified. When they find an appliance that claims  
4 to be qualified but they believe is not, they  
5 typically refer that analysis to the U.S.  
6 Environmental Protection Agency, or EPA, and the EPA  
7 can then revoke the Energy Star qualification of an  
8 appliance, and that has a direct connection to  
9 information that's provided to consumers. I think  
10 it's undisputed that the Energy Star logo is one of  
11 the most highly recognized logos by consumers and  
12 that it's very important as consumers make decisions  
13 about appliances.

14 Q To what extent or in what ways is the  
15 DOE testing of clothes washers different from the  
16 way an ordinary consumer uses it?

17 A I think the DOE testing is designed to  
18 be representative of how consumers as a whole use  
19 their clothes washers.

20 Q And what do you base that statement on?

21 A Again, the way in which the DOE tests  
22 are used.

23 Q For example, have you seen --

24 MR. DECKANT: Just object. Please let  
25 the witness finish his answer.

1 BY MR. LOGAN:

2 Q Sorry. I thought you were done.

3 A If you look at how the DOE tests are  
4 used, they're used to provide informations to  
5 consumers as a whole. The DOE tests are used, as I  
6 understand it, to provide, for example, Energy Star  
7 certification or decertification across an entire  
8 suite of appliances and not just to one single  
9 appliance or for one single consumer or for  
10 consumers in New Jersey but not California.

11 So, again, it's my understanding that  
12 these results are intended to be representative of a  
13 broad swath of consumers and decisions are based  
14 upon those that apply to, I guess, every appliance  
15 or in that sense every consumer who was purchasing  
16 that appliance.

17 Q Have you seen a document that has  
18 stated that the DOE tests are designed to be  
19 reflective of real-world use, or something of that  
20 nature?

21 A I think the documents that I've  
22 reviewed speak for themselves, and if you'd like to  
23 mark them, we could go through them. But I believe,  
24 if you take a holistic approach of the review of the  
25 documents, even just extant in this litigation, what

1 I've suggested will become apparent, which is that  
2 there's a clear intention for these tests to be  
3 applied across an entire range of appliances and to  
4 be representative of all consumers that are -- are  
5 buying these appliances as a whole in the aggregate.

6 Q Sitting here today, you cannot recall a  
7 particular document that says the DOE clothes  
8 washers tests are designed to reflect real-world  
9 use?

10 MR. DECKANT: Objection.

11 THE WITNESS: Again, what I've said is  
12 I believe the documents will speak for  
13 themselves. And as I said earlier today, I  
14 don't have, you know, a library in my brain of  
15 each document. Many of these are things just  
16 Bates numbered so I can't recall the precise  
17 titles of documents, but I believe a holistic  
18 review of the documents that I cite in  
19 Exhibit 2 to the Declaration that's marked as  
20 Deposition Weir-1 will provide context to  
21 understand that the DOE tests are designed to  
22 be representative and projectable across a  
23 large group or the totality of consumers.

24 BY MR. LOGAN:

25 Q Well, my -- I guess my problem with

1 this testimony is I've reviewed the Declaration and  
2 the documents that you refer to it, and I don't see  
3 a document that says the DOE tests are designed to  
4 reflect real-world use. So I'm asking you, giving  
5 you an opportunity, if you are aware of such a  
6 document, can you identify it? And feel free to  
7 confer with your report.

8 A I mean, I can look at my report, but  
9 again, what I would refer you and the reader of this  
10 transcript to is what's marked as Exhibit 2 to  
11 deposition Weir-1, which is my exhibit of facts,  
12 data and other information considered, which  
13 unfortunately includes a number of documents that  
14 are simply titled by Bates number. And as I sit  
15 here today I don't have a precise recollection of  
16 what each of these documents is or the exact  
17 contents of each one. But I believe if you conduct  
18 a holistic review, by which I mean don't just look  
19 at one page of any one document but look at all the  
20 documents in totality, the implication is clear,  
21 which is that the DOE test results are intended to  
22 be applied to an entire range of appliances across  
23 all of the consumers.

24 Q Again, sitting here today, you cannot  
25 identify a single document that says the DOE tests

1 are representative of consumer use?

2 MR. DECKANT: Objection.

3 THE WITNESS: You can ask me that  
4 question as many times as you want and what  
5 I've said today is that I don't have a  
6 photographic memory of what's in each one of  
7 these documents, but if you look at the  
8 documents in a holistic approach, not just any  
9 one page or any one document but all of the  
10 documents that I've cited in Exhibit 2 to  
11 Deposition Weir-1, I think the result is plain  
12 as day, that the DOE results are intended to  
13 apply across a broad range of appliances and  
14 not just a single one and that the results are  
15 intended to be informative to all consumers in  
16 the aggregate.

17 BY MR. LOGAN:

18 Q Have you ever recalled seeing a  
19 statement that the DOE tests for clothes washers are  
20 representative of consumer use?

21 MR. DECKANT: Objection.

22 THE WITNESS: I've certainly had that  
23 impression since the very beginning of my work  
24 on Energy Star analyses. Again, as I've said  
25 earlier today, I don't have a photographic

1 memory. I don't have all of the documents  
2 I've ever read in mind, but to me there is  
3 just zero doubt based upon my experience all  
4 the documents and studies that I've read, the  
5 implementations and use of these DOE tests  
6 that these results are intended to be  
7 projected to a large group of consumers.

8 BY MR. LOGAN:

9 Q You have had that impression, but do  
10 you ever recall seeing the document that stated  
11 that, or that is just your own independent  
12 conclusion based on your research?

13 A This is the impression that I have from  
14 reviewing many documents related to that topic. But  
15 I can't cite a particular one as part of a memory  
16 quiz here today.

17 Q What have you done to determine if DOE  
18 laboratory tests are reflective of real-world use?

19 A I have relied on the purpose of the DOE  
20 tests.

21 Q What is the purpose of the DOE tests?

22 A The DOE tests that are specific to this  
23 case are to make a determination of whether or not  
24 an appliance qualifies as an Energy Star product or  
25 not.

1           Q       Have you done any analysis to determine  
2       if the DOE tests are reflective of real-world use?

3           A       I don't believe I've conducted any  
4       independent tests. I'm relying on the Federal  
5       Government who uses these test results to apply them  
6       to every one of the appliances and to all consumers  
7       nationwide.

8           Q       Has the Federal statement stated that  
9       the DOE test are reflective of real-world use?

10           MR. DECKANT: Objection.

11           THE WITNESS: Again, my understanding  
12       from a review of documents in this case and in  
13       other cases is that these tests are reflective  
14       of the use of all of the appliances that are  
15       the subject of a particular test and are  
16       designed to provide information to a broad  
17       group of consumers who have purchased or may  
18       purchase these appliances.

19       BY MR. LOGAN:

20           Q       Let me see if I can break this down  
21       into particular testing elements and ask the  
22       question that way.

23                   For example, the -- according to your  
24       report, the DOE estimated number of annual cycles  
25       for the clothes washers is 392 cycles per year. Are



1 you aware of that?

2 A I am.

3 Q Where did the DOE get that number, 392?

4 A There is a regulation that provides for  
5 that number.

6 Q Where did they get that number? How  
7 did they decide 392?

8 A Who is "they"?

9 Q The DOE.

10 A I believe the DOE has taken that number  
11 directly from the statute that proscribes the method  
12 of testing.

13 Q So you are -- you believe that Congress  
14 wrote a statute that says that this testing should  
15 assume 392 cycles per year?

16 MR. DECKANT: Objection.

17 BY MR. LOGAN:

18 Q Is that your testimony?

19 A No. I'm saying that there is a statute  
20 or regulation that provides for that number and that  
21 the DOE test uses the various inputs from the  
22 statutes or regulations when it conducts its tests.

23 Q Right. So my question is, who came up  
24 with the 392 number? Was that a survey? Was it a  
25 guess? Where did 392 come from?

1           A           As I sit here today, I don't have a  
2           recollection of that.

3           Q           Has it always been 392, the DOE clothes  
4           washer test?

5           A           I would say the same answer. As I sit  
6           here today, I don't have a recollection one way or  
7           the other.

8           Q           Is it still 392 to this day for clothes  
9           washers being manufactured today?

10          A           I haven't made an investigation one way  
11          or the other.

12          Q           Do the named plaintiffs in this case,  
13          did they use 392 cycles per year?

14                   MR. DECKANT: Objection.

15                   THE WITNESS: I'm not interested in  
16          what any one individual has done. My analysis  
17          is tailored to a class of people, and my  
18          understanding, again, of the DOE tests is that  
19          it's using inputs designed to measure  
20          appliances across a broad swath of users. And  
21          so I believe that that's the correct level of  
22          analysis.

23          BY MR. LOGAN:

24          Q           But the answer is you're not aware of  
25          any individual plaintiff in this case who uses 392

1 cycles per year; is that your testimony?

2 A That is the wrong level of analysis so  
3 I haven't sought to understand that.

4 Q Is it your belief that the putative  
5 class members as a whole use on average 392 cycles  
6 per year?

7 A I believe that the DOE test result and  
8 the DOE tests are designed to be projectable to a  
9 large group of consumers and that the 392, based  
10 upon its use and determination by the Federal  
11 Government is a reasonable estimate for use in  
12 measuring the energy efficiency of washing machines.

13 Q Other than the fact that the DOE had at  
14 least have signed off on the 392 number, do you have  
15 any other reason for believing that 392 is a  
16 reasonable number to use in this case?

17 A I don't believe, as I think I've said  
18 already today, that I've made an independent  
19 verification of that number. I'm relying on the  
20 fact that that is a statute -- a statutory --  
21 statutorily provided number or that that number  
22 appears in a regulation, that that was determined by  
23 some element of the Federal Government, that that is  
24 a requirement of the DOE tests and that that test is  
25 designed to provide information that is applicable

1 across a broad range of appliances or a broad range  
2 of consumers, depending upon how you want to look at  
3 it.

4 Q Did you make any evaluation in this  
5 case of how the energy consumption of a clothes  
6 washer might fluctuate over time? For example, how  
7 the energy consumption of a clothes washer might  
8 fluctuate from year to year as it gets older?

9 A My analysis was focused on the delta  
10 between what was promised versus the delta of the  
11 test results and not, again, on any particular one  
12 washing machine.

13 Q And not on any particular one year?  
14 For example, you did not analyze what would the  
15 delta be from year to year or how would a clothes  
16 washer age?

17 A I think that's something that I've  
18 considered and my understanding of the nature of the  
19 DOE test result is that it's -- the DOE test results  
20 are designed not just to apply to one year, but to  
21 the entire lifespan of the clothes washers. And so  
22 the -- when, for example, the Energy Star is revoked  
23 as a result of a DOE test, it doesn't come back for  
24 retesting a year later. My understanding is that a  
25 disqualification and less challenged is permanent.

1           Q       When a clothes washer is tested  
2       pursuant to the DOE regulations, is it a new clothes  
3       washer or an old clothes washer?

4           A       As I sit here today, I don't recall. I  
5       believe the DOE tests would make that plain.

6           Q       It would not surprise you if I  
7       represented to you that testing is done of new  
8       clothes washer, not 10-year-old clothes washer?

9           A       Well, I would find that these  
10      appliances tend to only be sold over a period of a  
11      number of years, so I would assume that the DOE  
12      tests are going to be conducted within at least the  
13      early portion of the lifespan of these appliances.

14                 But, again, that doesn't change my  
15      opinions about how the DOE tests are designed and  
16      employed, which is to study an entire range of  
17      appliances for a broad range of consumers for the  
18      lifespan of the appliances.

19           Q       Did you conduct any evaluation in  
20      determining how the energy consumption of a clothes  
21      washer might differ depending on individual consumer  
22      use?

23           A       Again, I would advise the reader of the  
24      transcript that for purposes of determining  
25      class-wide damages, any individual level inquiry is

1 wildly inappropriate and that the appropriate level  
2 of analysis here is the energy efficiency of these  
3 appliances in the aggregate across the class or  
4 across the totality of the population.

5 Q Okay. So let me see if I can sum up  
6 the last few minutes of testimony. You did not  
7 conduct any individual analysis of how any  
8 individual consumer would use their clothes washer?

9 MR. DECKANT: Object to form.

10 BY MR. LOGAN:

11 Q Is that correct?

12 A My analysis has been focused in what I  
13 believe to be the correct level of analysis, which  
14 is to do an analysis on a class-wide basis and that  
15 any individual analysis would be inappropriate  
16 because it does not inform an aggregate level  
17 analysis of class-wide damages.

18 Q Your focus is on class-wide analysis,  
19 not on any one individual consumer; is that correct?

20 A That's correct.

21 Q And --

22 A That's my assignment in this case.

23 Q And the way that you would conduct a  
24 class-wide analysis is to rely on DOE methodologies  
25 and test results, not your own independent test

1 results; is that correct?

2 A That question unfortunately seems a  
3 little overbroad. Would you mind narrowing that  
4 down, please?

5 Q The way that you conduct a class-wide  
6 analysis in this case is by relying on DOE  
7 methodologies and test results; is that fair?

8 A That is one of the ways in which I  
9 examined damages in this litigation.

10 Q Other than relying on the DOE tests,  
11 did you conduct any independent evaluation of how  
12 consumers actually use their clothes washers?

13 A I don't believe that to be necessary in  
14 order to calculate class-wide damages.

15 Q So the answer is no?

16 A Again, I would not look at what any one  
17 individual is doing at all. I would look at what  
18 consumers in the aggregate or the class is doing,  
19 and I believe that the DOE results provide the best  
20 available measure of that.

21 Q So the answer is no?

22 A I standby my previous answer to your  
23 question.

24 Q Which I construe is no because you  
25 don't actually say no, you just explain why the

1 answer is no, but you don't actually say no?

2 MR. DECKANT: Objection.

3 THE WITNESS: I don't accept your  
4 characterization of my testimony. I would  
5 like my full answer to stand on the record,  
6 please.

7 BY MR. LOGAN:

8 Q Well, the question was, did you conduct  
9 any independent evaluation of how consumers actually  
10 uses their clothes washers. Your answer was, I  
11 don't believe that's necessary. Isn't that fair?

12 A I don't think that's the whole answer  
13 that I gave.

14 Q Okay.

15 A And so it's not fair that you are  
16 trying to mischaracterize my testimony.

17 MR. LOGAN: Why don't we -- why don't  
18 we take five minutes. Is that all right?

19 VIDEO OPERATOR: The time is  
20 approximately 10:15. We're going to go off  
21 the record.

22 (Brief recess.)

23 VIDEO OPERATOR: It's approximately  
24 10:29.

25 We are back on the record.



1 BY MR. LOGAN:

2 Q Mr. Weir, we have been talking about  
3 the DOE tests, whether or not those are reflective  
4 of the putative class here in this case. We talked  
5 about the cycles per year. But there are other  
6 aspects of the DOE tests I would like to determine  
7 if it is your opinion whether or not those aspects  
8 are also reflective of the behavior of the putative  
9 class in this case.

10 Are you aware that the DOE tests  
11 require a certain mix of water temperature settings  
12 to be used?

13 A I am aware of that.

14 Q You probably don't recall. I don't  
15 even think I recall. Do you know what those mix of  
16 water temperature settings are?

17 A I have looked at -- again, I apologize.  
18 I used the word "statute" and "regulation" because  
19 I'm not quite sure, but in whatever the guidelines  
20 are that govern how to do the test, I have read that  
21 and at one point became more intimately familiar  
22 with those settings than I care to admit, but as I  
23 sit here today, I would need to look at that  
24 document again to remember what the settings are.  
25 What I do remember is that the guideline is very

1 direct, that you look up the type of machine. I  
2 think typically these things are keyed to capacity,  
3 and then there's typically a lookup table based upon  
4 either those or other factors that tell you which  
5 settings to use for the test.

6 Q How is it that the DOE determined to  
7 use this particular mix of water temperature  
8 settings?

9 MR. DECKANT: Objection.

10 THE WITNESS: Again, my understanding  
11 is that the DOE tests are based upon the  
12 settings that are prescribed in those statutes  
13 or regulations.

14 BY MR. LOGAN:

15 Q So I will represent to you it is  
16 regulations --

17 A Okay.

18 Q -- and I realize that the DOE is  
19 referring to those regulations. My question is, do  
20 you know how those regulations were drafted and what  
21 studies were done in order to substantiate their  
22 chosen mix of water temperature settings?

23 A I don't have a specific recollection,  
24 but, again, it's my understanding that these tests  
25 are designed to be representative of both -- all of

1 the -- all similar appliances and to be projectable  
2 to a wide range of the population. Sort of an  
3 aggregate group such as the class.

4 Q Do you know when the mix of water  
5 temperature settings in the DOE regulations was  
6 drafted?

7 A I don't have a recollection one way or  
8 the other as I sit here today.

9 Q Do you know if consumers' clothes  
10 washing habits have changed over time, say in the  
11 past 20 years?

12 A I haven't made a study of the past 20  
13 years because my understanding is that the proposed  
14 class period here starts sometime in 2009 at the  
15 date of first sale. And I used the statutes and  
16 regulations that were applicable at that time to  
17 evaluate the particular washing machines that are  
18 the subject of this particular litigation.

19 And, again, I understand that it's the  
20 DOE's intention to have results that are applicable  
21 to an entire fleet of appliances and that those  
22 results are projectable to the broader population.

23 Q When you say "they're projectable to  
24 the broader population," what do you mean by that?

25 A That the information in the aggregate

1 is reflective of the larger population.

2 Q Is reflective. And so it's your  
3 testimony that the DOE examines the population of  
4 the United States and that's how they arrive at  
5 their test procedures?

6 A No. Again, my understanding is that  
7 the DOE follows test procedures that are set forth  
8 in, as you have affirmed me, as a regulation.

9 Q Yes, but I believe it was your  
10 testimony that the DOE was trying to capture what  
11 consumers actually do in their clothes washing  
12 habits; is that your testimony?

13 A My testimony is that the -- the DOE  
14 test results are designed to provide information  
15 that is useful to consumers in the aggregate.

16 Q All right. Well, I -- I think we're  
17 going in circles here.

18 Regardless of whether or not the DOE  
19 test results are reflective of the putative class  
20 here, the -- you -- you admit, at least, that you  
21 rely on the DOE test results in determining the  
22 energy expense damages in this case?

23 A Yes. The DOE test results are one of  
24 the core elements of the energy expense damage  
25 formula that I put forth here. Although I would say

1     that the methodology that I put forth here is quite  
2     flexible, so if there were an alternate measure of  
3     actual energy used versus the Energy Star promised  
4     use, it would be very easy to take my methodology  
5     and take that different input and obtain a result.  
6     And, in fact, my workpapers are formulaic so we  
7     could put in any result of the tested use of the  
8     Maytag Centennial washing machines at issue in this  
9     case and obtain a result using the identical  
10    methodology that I've put forth.

11           Q       So are you advocating for the position  
12    that the DOE methodology is the proper measure of  
13    energy expense damages in this case?

14           A       That's a bit of a tricky question. My  
15    tasks in this case, up to now are I think at a high  
16    level could be described as two-fold. One of which  
17    was to make a determination about whether or not  
18    class-wide damages could be calculated in this case,  
19    and the second would be to make an effort to make a  
20    preliminary estimate of those damages. And so the  
21    methodology that I set forth for calculating energy  
22    expense damages, as I just testified a moment ago,  
23    can use any measure of the actual usage of -- actual  
24    energy usage as tested of the washing machines at  
25    issue in this case. But I believe that the DOE test

1 results provide a reliable and reasonable estimate  
2 of use for purposes of calculating class-wide  
3 damages and I base my preliminary estimate of energy  
4 expense damages upon, in part, the DOE test results.

5 But, again, if new information or  
6 different test results became available, I would  
7 need to consider them before I made a determination  
8 about whether they were better or more reliable than  
9 the DOE test results. But I have no -- no problem  
10 suggesting today that one reasonable method of  
11 calculating energy expense damages in this case  
12 would be to use the DOE test results.

13 Q When were you contacted to draft this  
14 report here labeled as Exhibit 1?

15 A To be honest, I have no recollection.

16 Q Even the year?

17 A Well, I guess, as asked when I was  
18 contacted to prepare this Declaration, I think I can  
19 confidently say that was sometime in 2015, but what  
20 month I'm not sure.

21 Q Okay. How long did it take you to  
22 draft this report?

23 A Can you tell me what you mean by the  
24 word "draft"?

25 Q Well, did you draft the report?

1           A           Again, I don't know what you mean by  
2     the word "draft."

3           Q           Did you type the report?

4           A           Yes, I --

5           Q           On a computer software or program?

6           A           I literally typed the report. So if by  
7     "draft the report" you mean "type," I probably -- I  
8     don't know that it took cumulative days, but it was  
9     probably done over a matter of a few days. I'm just  
10    talking about typing.

11          Q           Okay. Well, let me -- let me ask a  
12    couple of clarifying questions. Did anyone assist  
13    you in the research or the drafting of the report?

14          A           And, again, by the word "draft," you  
15    mean typing up, literally the typing of the  
16    document?

17          Q           Let me -- let me take a broader scope  
18    of the word "drafting," anything from outlining to  
19    typing to formulate -- formulating your opinions in  
20    this report, did you do it all by yourself or did  
21    anyone in, for example, your office assist you?

22                 MR. DECKANT: I'd like to caution the  
23    witness that he can answer the question as to  
24    whether anyone in the office assisted, but you  
25    should be careful not to reveal the content of

1 draft reports that were not final and also  
2 work product from within his office.

3 You can answer.

4 THE WITNESS: And, again, with your  
5 broadened definition of drafting, we're  
6 talking about the creation of the words, not  
7 necessarily the numerical analysis or  
8 background research. I just want to make sure  
9 we're talking about the same things.

10 BY MR. LOGAN:

11 Q The -- did -- did anyone help you with  
12 the report, other than counsel?

13 A Well, again, "help with the report," I  
14 don't know what that means. If we're talking about  
15 literally putting the words together in the report,  
16 then I would say nobody helped me with that. The  
17 words in this report are 100 percent my own. Your  
18 characterization that I was helped by counsel is  
19 inaccurate.

20 Q I didn't mean to characterize that  
21 counsel helped you. How many -- you are currently  
22 employed; is that correct?

23 A Yes, I am.

24 Q What is the name of your company?

25 A Economics and Technology, Incorporated.



1 I think we can agree to abbreviate as ETI for the  
2 day.

3 Q And how many people are employed by  
4 ETI?

5 A Four.

6 Q Who are those people?

7 A Dr. Lee Selwyn is the founder and  
8 president of the company. Myself, I am  
9 vice-president of the company. Andrew Kearns is my  
10 economic analyst. And Emily Stein is our accountant  
11 and bookkeeper.

12 Q Did any of those people help you in  
13 formulating your opinions as reflected in your  
14 report?

15 A I don't think anyone assisted in the  
16 formulation of my opinions in this case. Mr. Kearns  
17 did assist with some of the background research.

18 Q Who did the, for example, calculations  
19 that appear in these tables?

20 A Those would be done by me.

21 Q Did you use a calculator did you do it  
22 by hand?

23 A In these tables?

24 Q Let me refer to Table -- for example, 3  
25 and Table 4 on pages 7 and 8 of your report. Did

1     you do those calculations?

2             A         Yes.

3             Q         And -- and the calculation we're  
4     talking about here is multiplication?

5             A         Well, I would like to clarify your use  
6     of the term of "calculations" because, for example,  
7     the number of units, although it appears here is the  
8     result of a calculation. The annual use difference  
9     is the result of a calculation. The additional  
10    energy expense number is the result of a  
11    calculation. And then the total energy expense is  
12    some multiplication of those calculated values. I  
13    did all of the calculations, but the manner in which  
14    they were performed is different.

15            Q         Since this Declaration was filed on  
16    December 28, 2015, have you revised your opinions in  
17    any way?

18            A         I don't think I've seen anything that  
19    would cause me to revise my opinions. I guess as a  
20    technical matter, when I was asked to draft this  
21    report I was asked to consider the possibility of a  
22    nationwide class. It's my understanding that  
23    subsequent to my execution of this document I  
24    believe only seven subclass states were the subject  
25    of the class certification movement.

1           So some of the numbers here that I  
2     present on a nation-wide basis, I think they're  
3     still helpful as an illustrative measure and for  
4     walking through the calculations, but I would refer  
5     the reader of this transcript and the reader of my  
6     report to the appendices where I have state specific  
7     calculations for the numbers that are specific to  
8     the subclass states, actually extant to the  
9     litigation. But as to my core opinions, I don't  
10    think anything has changed.

11           Q       And you are billing by the hour in this  
12    case?

13           A       That's correct.

14           Q       And your rate is \$600 per hour?

15           A       That's correct.

16           Q       Now, when we spoke a few years ago your  
17    rate was \$450 per hour. How long has it been 600?

18                    Let me -- let me clarify. Is 600 your  
19    normal rate at this time?

20           A       My current rate for new projects is 650  
21    an hour, but we -- but when we agree to work on a  
22    project, except in rare circumstances, specify the  
23    rates, and for cases that are ongoing for many  
24    years, we typically honor the rate that we put in  
25    here. So the \$600 rate that I have contractually

1 agreed to for this case is still operative for my  
2 work in this case.

3 Q At some point your rate was \$600, but  
4 your current rate for new projects is \$650 per hour?

5 A I would say that's a general summary.  
6 We do have a provision. Sometimes we work for  
7 Government clients or others we have a discounted  
8 rate schedule. But my going rate, for example, if  
9 you called me tomorrow and once, by the way, our  
10 conflict of interest is over I would love to hear  
11 from you to talk about potential engagements, the  
12 going rate is 650.

13 Q I'll get right on that.  
14 Bursor and Fisher doesn't get the  
15 repeat customer discount?

16 A They do not.

17 Q Do you know how many hours you have  
18 billed on this project so far?

19 A That is a knowable piece of  
20 information, but as I sit here today, I don't know  
21 what the number of hours is.

22 Q Do you know, for example, if it is more  
23 than 100?

24 A If you asked about a smaller number, I  
25 could probably say that it was more because I

1 remember some days pouring over the statutes and  
2 regulations and doing the calculations, but I don't  
3 know whether it's more or less than 100 hours.

4 Q And the principal of ETI, Dr. Selwyn  
5 was it?

6 A Correct. S-E-L-W-Y-N just so the  
7 record is clear.

8 Q Did Dr. Selwyn review your report?

9 A These days it's relatively rare that he  
10 would review a Declaration that I submit. But,  
11 again, I would defer to the time records in the --  
12 in the project. I can't state with certainty that  
13 he would not have read over it.

14 Q Why don't we turn to the back of your  
15 report where you list the cases that you have worked  
16 on in the past few years. This list, I know, has  
17 grown considerably in recent years.

18 How many times have you worked with  
19 counsel in this case?

20 A I don't know off the top of my head. I  
21 think my statement of qualification speaks for  
22 itself.

23 Q It would not surprise you to learn  
24 that, in fact, you've worked with counsel on this  
25 case more -- more than 10 times?

1           A           I think my first engagement with the  
2           Bursor firm dates back to 2004, so having one or two  
3           engagements a year, on average, does not surprise me  
4           in the least.

5           Q           Of all the cases that you list, say,  
6           for example in the past two years, do you know what  
7           percentage of those cases have involved at least one  
8           of the counsel here?

9           A           Again, I think the document will speak  
10          for itself, but I don't know that percentage off the  
11          top of my head.

12          Q           Would it surprise you to learn that  
13          about half of your engagements over the past two  
14          years have involved counsel here?

15          A           Given that there are half a dozen law  
16          firms engaged in this project, I would take your  
17          word for it. Again, I think the document will speak  
18          for itself.

19          Q           In -- in your professional life, you  
20          act as a expert witness and consultant for  
21          attorneys, correct?

22          A           That is one of the rolls that I have.

23          Q           What other rolls did you have in your  
24          employment, say, in 2015?

25          A           We provide a general suite of economic

1 and statistical and data analytic consulting  
2 services which we provide to private businesses,  
3 which we provide to regulatory agencies. We take on  
4 projects that relate to public policy and  
5 regulation, and one of the things I guess that this  
6 record should probably reflect is that we've been  
7 talking about, in the past couple of questions and  
8 answers, my statement of qualifications, which is  
9 Exhibit 1 to Deposition Weir-1. And the list of  
10 cases that you refer to are cases where I have made  
11 a public appearance as a testifying expert. And  
12 that does not reflect the individual engagements or  
13 projects that I have worked on where I don't provide  
14 public-facing testimony.

15 So, for example, my firm has  
16 long-standing relationships with the U.S. Department  
17 of Justice, the Pennsylvania Department of Revenue,  
18 the California Public Utilities Commission, the  
19 Illinois Attorney General -- Illinois Attorneys --  
20 sorry, Illinois Attorney General's office.

21 And we do a lot of work for those  
22 clients and I work directly with those clients, but  
23 rarely in a testifying capacity. So there are  
24 dozens of projects that I've worked on over the past  
25 few years that are not directly reflected here in

1 the list of testimony and are reflected  
2 referentially in the opening description of my  
3 qualifications and typical work.

4 Q Thank you for the clarification.

5 If you had to divide your time in 2015  
6 generally between working with lawyers on litigation  
7 and other types of professional activities, what  
8 would that breakdown be?

9 A In 2015 I probably spent between 40 and  
10 50 percent of my time working on litigation and  
11 between 50 and 60 percent on other endeavors.

12 Q And among your work on litigation, my  
13 review here shows that it is almost exclusively for  
14 plaintiffs' lawyers in putative class actions; is  
15 that accurate?

16 A I would say recently my litigation  
17 experience has been in class action experiences and  
18 I would also state that my firm is open to any  
19 particular client that we feel we could reasonably  
20 work with, including defendants. And as I stated  
21 before just moments ago, after I no longer have a  
22 conflict of interest, I would be more than happy to  
23 discuss engagements with you. But the work that is  
24 typically requested of us comes from counsel for  
25 plaintiffs as it relates at least to the litigation



1 work in which I'm involved.

2 Q When was the last time you were hired  
3 by a defendant in a litigation?

4 A Many of the times that I'm involved in  
5 litigation for a defendant, I do not serve as a  
6 testifying expert. So, again, this statement of  
7 qualifications and list of testimony doesn't reflect  
8 all of the times that I've worked, but I would say  
9 within the last two to three years we have worked  
10 for a major defendant in litigation.

11 Q The way you phrased that, you've had  
12 work for "a major defendant in a litigation," are  
13 you talking about a single engagement or multiple  
14 engagements for defendants in litigation?

15 A Well, again, without my list of  
16 projects in front of me, it's hard for me to  
17 remember the precise time frame of everything I've  
18 done, so I'm confident in telling you that recently  
19 there is definitely at least one. But whether  
20 that's more than one in the last year or two, it's  
21 hard for me to state with certainty. But we  
22 regularly receive requests to work with defendants  
23 and sometimes we have the opportunity to testify on  
24 behalf of defendants.

25 This statement of qualifications does

1 include sometimes when I have testified on behalf of  
2 defendants. And, again, I have no predilection for  
3 working with plaintiffs per se. I'm more than happy  
4 to take work for a defendant and to testify about  
5 economics, statistics, public policy, regulation,  
6 whatever the particular project may be.

7 Q When you are engaged for a plaintiff in  
8 a putative class action, are you typically hired to  
9 do damages modeling?

10 A I don't know if I would use the word  
11 "typical." We -- our engagements are almost always  
12 to provide a general suite of economic research and  
13 litigation support services. In class action  
14 litigation, that may or may not include work on the  
15 issue of making a determination about the  
16 possibility of or actually calculating class-wide  
17 damages. There are numerous engagements that I have  
18 with plaintiffs that don't relate to the calculation  
19 of damages.

20 Q How many reports over the past -- well,  
21 over the course of your career, have you filed that  
22 have provided an opinion on whether or not  
23 class-wide damages could be measured?

24 A Can I hear that question back, please?

25 (At which time the following question

1 was read back by the reporter:

2 "Question: How many reports over the  
3 past -- well, over the course of your career,  
4 have you filed that have provided an opinion  
5 on whether or not class-wide damages could be  
6 measured?")

7 MR. DECKANT: I would like to caution  
8 the witness that some of those cases may have  
9 involved confidentiality agreements. To the  
10 extent that you can answer it without  
11 violating those agreements, go ahead.

12 THE WITNESS: Unfortunately I'm not  
13 even going to get to that particular type of  
14 issue because without doing some amount of  
15 research as I sit here today I can't answer  
16 that question. I just don't know off the top  
17 of my head.

18 BY MR. LOGAN:

19 Q Well, it is fair to say that you've  
20 filed several reports in litigation, many of which  
21 are listed here, that opine the class-wide damages  
22 can be measured.

23 A I think it's a matter of public record  
24 that I have submitted some reports in some cases  
25 where I've testified that class-wide damages can be

1       calculated.

2               Q       Have you ever submitted a report that  
3       said class-wide damages could not be measured?

4               A       I have never been hired by a client who  
5       was interested in having me state that opinion on  
6       their behalf. I guess I would clarify and say there  
7       are numerous class action engagements where I'm  
8       asked to make a determination about whether damages  
9       may be calculated and I make the determination that  
10      they cannot. I don't know that those efforts have  
11      ever resulted in public testimony.

12              Q       So, for the testimony that you have  
13      given publicly, it has always been your opinion that  
14      for the facts of that case class-wide damages are  
15      capable of class -- of measurement?

16              A       And I'm going to need to have you read  
17      back that question.

18              Q       Let me rephrase that one.

19                      In the testimony that you have given  
20      publicly, it has always been your opinion that  
21      class-wide damages are capable of measurement?

22              A       Again, the way that question is  
23      phrased, I don't believe that's correct.

24              Q       And specify what you mean by that  
25      answer.

1           A           Well, I've worked in any number of  
2           engagements, for example, that don't involve a  
3           calculation of class-wide damages at all, and so  
4           I've offered no opinion about class-wide damages one  
5           way or the other.

6           Q           So let me -- let me clarify then.

7                       In putative class actions, when -- when  
8           called upon to provide an opinion about whether or  
9           not class-wide damages can be measured, you have  
10          always answered in -- that the answer is yes, that  
11          they are capable of being measured?

12          A           Again, I don't think that's quite  
13          accurate. I've been asked many times to evaluate  
14          whether class-wide damages are possible to be  
15          calculated in a number of cases. And in some cases  
16          I make the determination that the answer is yes.  
17          And in some cases I make the determination that the  
18          answer is no. And in the cases where I have made  
19          the determination that it's possible to calculate  
20          class-wide damages, sometimes I'm asked to testify;  
21          other times I'm not. And in cases at least thus far  
22          where I've made the determination that class-wide  
23          damages may not been calculated, I've not been asked  
24          to testify.

25          Q           When was the last time that you

1 developed an opinion that class-wide damages could  
2 not be calculated?

3 A It was the day before I left for my  
4 paternity leave. So I think it was the middle-ish  
5 of March.

6 Q And in that instance what were the  
7 reasons why class-wide damages could not be  
8 measured?

9 A The conversations that I had with that  
10 potential client are subject to non-disclosure, so I  
11 can't tell you.

12 Q Other than conversations that you can't  
13 tell me about, can you recall an instance where  
14 class-wide damages could not be measured, in your  
15 opinion?

16 A I don't think I've ever made a  
17 determination about class-wide damages that hasn't  
18 been covered by an NDA or protective order.

19 Q Generally, what sort of facts would  
20 cause you to opine that class-wide damages could not  
21 be measured?

22 MR. DECKANT: Objection.

23 THE WITNESS: Those things are so case  
24 specific, I'm not sure I can provide you with  
25 a broad category of things.

1 BY MR. LOGAN:

2 Q Well, in your opinion -- let me  
3 rephrase.

4 In your opinion, is it ever the case  
5 that individual damages are so disparate from one  
6 another that class-wide damages cannot be  
7 calculated?

8 A I'm having a hard time with that  
9 question for a couple of reasons. One of which is  
10 that at least in the back of my mind, it sounds like  
11 there may be questions of the law. And so I'm not a  
12 lawyer and I'm not here to give legal testimony here  
13 today, so I don't know whether, as a matter of the  
14 law, there would ever be a case where individual  
15 damages and variations therefrom would legally  
16 prevent a measure of class-wide damages.

17 What I will say is that when I think  
18 about class-wide damages, I typically tend to take  
19 what I described as a tops-down approach, which  
20 seeks to determine damages without ever having to  
21 get at what individual damages are. There are  
22 exceptions to that, but to me oftentimes the best  
23 method of determining class-wide damages never  
24 requires a calculation of any individual's damages.  
25 And from that perspective, at least economically,

1     how you distribute money to individuals, for  
2     example, as part of a settlement or a claims  
3     administration, has no bearing on the calculation of  
4     class-wide damages. And even with widely divergent  
5     individual damages, they are going to sum up to  
6     something that, in total, is class wide.

7                 So, again, I don't know whether there  
8     are legal prohibitions about that, but as a matter  
9     of economics, I don't think individual variation in  
10    damages prevents the calculation of class-wide  
11    damages, especially when one is conducting a  
12    tops-down analysis that never looks at individual  
13    damages in the first place.

14            Q       So talk to me a little bit more about  
15    this "tops-down approach." It's your approach  
16    generally in putative class actions to only look at  
17    class-wide factors and never look at individual  
18    damages?

19            A       Again, I apologize if my last answer  
20    wasn't clear. I would never make a broad-strokes  
21    comment that I only ever do tops-down approaches or  
22    only ever do things without looking at individual  
23    circumstances. The -- to contrast a tops-down  
24    approach, one way to calculate damages may be what I  
25    would describe as a bottoms-up approach, where you



1 take Class Member A's damages and add them to Class  
2 Member B's damages and add them to Class Member C's  
3 damages and arrive at the total. And the bottoms-up  
4 and tops-down approach should result in the same  
5 calculation, and therefore to me there's no economic  
6 reason necessarily to choose one or the other. The  
7 tops-down approach is often faster and avoids the  
8 need for individual inquiry, which I understand is  
9 typically one of the goals of the calculation of  
10 class-wide damages. So the tops-down approach seeks  
11 to look in the aggregate at the class in total and  
12 that analysis is often simpler and more elegant than  
13 a bottoms-up approach.

14 Q And in this case you did a tops-down  
15 approach?

16 A Yes. All of the measures of damage  
17 that I propose in this case are tops-down  
18 calculations.

19 Q And why did you select a tops-down  
20 approach as opposed to a bottoms-up approach for  
21 this case?

22 A Again, as I said, I find the majority  
23 of cases, it is a simpler and more elegant approach  
24 to use a tops-down approach when your goal is to  
25 understand class-wide damages, which was my goal

1 here. And the available data, the nature of the  
2 types of damages all lend themselves handily to the  
3 tops-down approaches that I specify in my  
4 Declaration.

5 Q In a product -- you've filed several  
6 reports that are somewhat similar to the issues here  
7 where the -- you were trying to determine the value  
8 of a particular product attribute. You've done this  
9 many times; is that correct?

10 A Again, I would probably rephrase that  
11 to state that there are sometimes that I have  
12 calculated the value of an attribute, which is one  
13 of the things that I have done in this case.

14 Q And how do you go about constructing a  
15 damages model in a case like this?

16 A Well, "in a case like this," tell me  
17 what you mean by that.

18 Q A case where there is an allegedly  
19 false representation on a consumer product label.

20 A So you're not being so granular as to  
21 be reflecting an Energy Star issue or a particular  
22 energy element that can result in a different type  
23 of damages?

24 Q That's right.

25 A The tops-down approach at the highest

1 level is going to be some measurement of the value  
2 of the representation or the impact of the  
3 representation. Sometimes it could be a price  
4 premium; other times it might be a diminution in  
5 value. And you take that measurement and multiply  
6 by the either total sales or relevant subset of  
7 sales for the class definition and you result the  
8 damages relating to the value of the attribute.

9 Q And how -- how does one go about  
10 calculating a price premium for a product attribute?

11 A That's very hard for me to say without  
12 more information. The very first thing I would want  
13 to do is understand the particular attribute in  
14 question, the facts and circumstances, but at the  
15 highest level the first things that come to mind are  
16 studies such as Dr. Dennis and Dr. Sukumar have  
17 performed, for example, using a conjoint or CVM  
18 survey to make a marketplace evaluation of the price  
19 premium attributable, for example in this case to  
20 the impact of the presence of the Energy Star when  
21 the product should not have borne the Energy Star.  
22 And an isolation of the price premium solely  
23 attributable to that attribute.

24 Q So would it make sense to say that in  
25 order to construct the damages model in a putative

1 class action, you would need a model and you would  
2 need data to populate that model? Generally, does  
3 that make sense?

4 A Again, your -- your questions are so  
5 broad strokes that I don't want to answer in the  
6 affirmative because there's almost always an  
7 exception to every rule.

8 Q In this case you have a model and data  
9 to populate the model?

10 MR. DECKANT: Did you finish your prior  
11 answer?

12 BY MR. LOGAN:

13 Q My apologies.

14 A I was just going to say -- well, I  
15 think my prior answer is complete enough that I can  
16 say in this case I have provided both models and  
17 suggested data that can be used in those models;  
18 although my typical caution is that the  
19 methodologies that I provide here are very flexible.  
20 And so if new or additional data becomes available,  
21 the methodologies that I had provided are plug and  
22 play.

23 So, for example, if we have a different  
24 measure of the price premium attributable to the  
25 Energy Star, that's very easily plugged into the

1 methodology that I provide here, and I have a  
2 spreadsheet that would give us an answer based on  
3 upon that new data point in a matter of seconds.  
4 Similarly with the energy expense damages, if we had  
5 new testing data or some other input that we wanted  
6 to use, it would be very easy for me to get a result  
7 based upon the methodology that I've set forth.

8 Q So we've been talking about the  
9 tops-down and bottoms-up approach for a putative  
10 class actions. How would your approach change if  
11 you were calculating damages for one plaintiff in  
12 this case instead of the whole class?

13 A At this time I haven't been given that  
14 assignment. I've given it no consideration, and I  
15 can't answer that question as I sit here today.

16 Q So to clarify, you -- you have -- you  
17 have not thought about how to calculate any one  
18 individual's damages in this case?

19 A That's correct. My assignment was to  
20 calculate class-wide damages. I don't believe one  
21 needs to understand any one individual's damages in  
22 order to understand class-wide damages, and any one  
23 individual's damages had no impact on the total  
24 calculation of class-wide damages when measured, at  
25 least through a tops-down approach. And so I don't

1 need to understand and have not taken to understand  
2 any one individual's damages.

3 Q Let me go back to this price premium.  
4 When you work on an allegedly false labeling case  
5 such as this one, your damages model might involve  
6 the calculation of a price premium?

7 A Can you just repeat that question for  
8 me?

9 Q Sure. When you work on a labeling case  
10 such as this one, your damages model may involve the  
11 calculation of a price premium?

12 A It may involve the calculation of a  
13 price premium.

14 Q What does the term "price premium" mean  
15 to you in the context of your work?

16 A You need to be more specific because my  
17 work is quite broad.

18 Q Why don't we just make this about your  
19 report. What does the term "price premium" mean in  
20 the context of your report?

21 A As I used the term in my Declaration in  
22 this case, I referred to the amount in the  
23 marketplace that consumers have actually paid as a  
24 direct result of defendant's behavior of labeling  
25 their washing machines as being Energy Star

1 certified when, in fact, they were not.

2 Q Now, in this answer you referred to the  
3 amount in the marketplace that consumers have  
4 actually paid as being what you were trying to  
5 measure; is that accurate?

6 A Correct.

7 Q And why is that important?

8 A Because that's the measure of damages  
9 in the case as it relates to price premium damages  
10 in that section of my report.

11 Q But -- but why is it important to  
12 determine what consumers actually paid? I'm not  
13 trying to trick you.

14 A And I don't know that I have a better  
15 answer other than I believe that's the measure of  
16 damages that's appropriate for price premium  
17 calculation.

18 Q You're familiar with the term  
19 "part-worth"?

20 A Yes.

21 Q And is part-worth similar to a price  
22 premium in the sense that you were trying to  
23 determine of -- the price of a product, what portion  
24 of that price is attributable to a certain product  
25 characteristic?

1           A           A part-worth is one singular element  
2           that is the output of -- or typically the output of  
3           a conjoint survey. And I would not equate a  
4           part-worth at the highest level with the measure of  
5           a price premium, but I would state that given  
6           appropriate information, information about  
7           part-worth results from a conjoint can inform one  
8           about what the price premium attributable to a  
9           particular attribute is.

10          Q           Is the price premium in this case, is  
11          that stated in terms of a dollar figure or a  
12          percentage? Or both?

13          A           I believe I have focused on the price  
14          premium as a percentage in this case.

15          Q           So the price premium is a percentage in  
16          this case, meaning that if Consumer A purchased the  
17          clothes washer for \$300 and Consumer B purchased the  
18          clothes washer for \$500, you would apply the same  
19          percentage to both consumers, or at least your  
20          analysis would not call for a different percentage  
21          depending on price?

22          A           I don't think that's an accurate  
23          characterization because what I do with the price  
24          premium percentage is apply it in the aggregate  
25          across the total purchases of the class, not to any



1 one individual.

2 Q You analyzed the average retail price  
3 of the clothes washer at issue in this case; is that  
4 correct?

5 A That's correct.

6 Q And I believe that you calculated that  
7 average retail price to be approximately \$406?

8 A That sounds like it's in the right  
9 ballpark. We could go back and look at that  
10 specifically.

11 Q Is it your opinion in this case that  
12 the price premium for clothes washers is not -- as a  
13 percentage is not dependent upon the calculation of  
14 the average retail price?

15 A I'm going to need to have you repeat  
16 that. I was distracted in the middle of the  
17 question.

18 Q Let me -- let me rephrase it.

19 Is the relationship between average  
20 retail price and price premium, is it a linear  
21 relationship such that the average price premium  
22 that you calculate could be applied no matter what  
23 the underlying average retail price?

24 A I don't know that I could agree with  
25 that proposition as stated so broadly. I would say

1 that in this case I understand that the price  
2 premiums that were calculated were designed to focus  
3 on the actual prices that were paid for the  
4 Centennial washing machines, and I feel very  
5 comfortable, based upon my discussions with  
6 Dr. Dennis, Dr. Sukumar, my review of their  
7 declarations, my review of the documentary evidence,  
8 Whirlpool's own calculation of the price premium,  
9 that these premiums can be applied in the aggregate  
10 across all of the total purchases of the product to  
11 give a reliable estimate of the price premium  
12 damages extant in this litigation.

13 Q There are three price premium  
14 percentages that you note in your report, and I'll  
15 just refer you to page 16: 55, 48 and 44 percent,  
16 not counting the decimals.

17 Do you see that?

18 A Yeah. Those are the -- well, that's  
19 not 100 percent correct. You rounded. But those  
20 are the pre-decimal integer numbers that are listed  
21 in the table, the document and the price premium  
22 percentages speak for themselves.

23 Q Do you have an opinion as to which one  
24 of these numbers is correct? Or the most accurate?

25 A Based upon what I understand about

1 these numbers, I believe all of these provide a  
2 statistically reasonable estimate of the price  
3 premium at issue in this litigation.

4 Q Well, there's a difference between  
5 44.3 percent and 55.7 percent to the tune of tens of  
6 millions of dollars in this case; that's correct?

7 A I think if you apply each of those two  
8 numbers and then look at the difference in damages,  
9 yes, the difference is maybe roughly 20 million.

10 Q So you said all of these percentages  
11 are statistically reasonable, but did you develop an  
12 opinion as to which one is the most accurate?

13 A Again, what I'm saying is that I  
14 haven't made -- my determination is that one of  
15 these is not more accurate than the other and that  
16 they are all reasonable for consideration in terms  
17 of the calculation of damages. And, again, they're  
18 all inputs into the price premium methodology that I  
19 set forth. So a judge or jury could determine that  
20 any reasonable measure of price premium could be  
21 applied to this formula to obtain class-wide  
22 damages.

23 Q Well, if you were put on the stand at  
24 trial and you said -- and the question was, which  
25 one of these should the jury award, what would your

1 answer be?

2 MR. DECKANT: Objection.

3 THE WITNESS: As I sit here today,  
4 because I have not yet been assigned the work  
5 of making that determination, I don't know  
6 that I have a particular opinion. I think I  
7 would advise the jury to consider the  
8 providence of each of these numbers,  
9 Whirlpool's own calculation, the Dennis and  
10 Sukumar surveys, to understand the testimony  
11 of each of those experts, and that my  
12 methodology can be applied reasonably with any  
13 of these numbers and that the jury can make an  
14 informed decision about which one they choose  
15 to award.

16 MR. LOGAN: Does anyone need a break?  
17 I've kind of reached a point in my outline  
18 where that would be okay for me.

19 MR. DECKANT: Yes.

20 MR. LOGAN: All right.

21 VIDEO OPERATOR: Okay. The time is now  
22 approximately 11:16. We're going to end  
23 Videotape Number 1 in today's deposition of  
24 Mr. Colin Weir on Friday, April 22, 2016. We  
25 are off the record.

1 (Brief recess.)

2 VIDEO OPERATOR: The time is now  
3 approximately 1:28. We are going to begin  
4 Videotape Number 2 in today's deposition of  
5 Mr. Colin B. Weir on Friday, April 22, 2016.

6 BY MR. LOGAN:

7 Q Mr. Weir, in your -- in an answer that  
8 you gave to a question I think about a -- an hour  
9 ago, my apologies for going back this far, you -- I  
10 believe that you were generally describing your  
11 approach to damages modeling for a case like this as  
12 trying to determine the delta between what was  
13 advertised and what was delivered.

14 Do you recall saying something like  
15 that?

16 A I have a general recollection about a  
17 line of questioning. Again, I think you've  
18 potentially misparaphrased and you've also defined a  
19 case like this in other context to expressly refer a  
20 way to that type of damages. But I think the energy  
21 expense damage calculation that I've put forward  
22 refers generally to the delta of what is implied by  
23 the Energy Star certification and the measure --  
24 some measure of the actual performance as I've used  
25 here in a preliminary estimate the results of the

1 DOE testing.

2 Q So to sum up for the energy expense  
3 damages here, you were trying to calculate the delta  
4 between what was implied by the Energy Star label  
5 versus what was the actual performance of the  
6 clothes washers here?

7 A Maybe -- if I used that term "implied,"  
8 maybe that was the wrong term. What I've used as --  
9 as the measurement of the Energy Star use is the  
10 minimum amount of energy required in order to be  
11 Energy Star certified. So that's based on the  
12 then-extant Federal regulations that govern Energy  
13 Star certification.

14 So I understand actually that Maytag  
15 itself advertised these washing machines as being  
16 more efficient or at least have stated that they  
17 were more efficient than the Energy Star requires.  
18 So another way that you might consider damages would  
19 be to take what Maytag had claimed about the  
20 product, but I think as a conservative measure here,  
21 using the -- the minimum requirement for Energy Star  
22 certification is a reasonable procedure.

23 Q Well, let's go back to this term  
24 "implied." What does the Energy Star sticker look  
25 like?

1           A           Boy, it's actually been a while since  
2 I've looked at that precisely, but I believe it's a  
3 star logo with a circle in it that says "Energy  
4 Star" in script.

5           Q           The sticker itself is -- it does not  
6 contain numbers? That's correct?

7           A           Well, I would --

8           Q           It's an E and a star and maybe the word  
9 "Energy Star," that's what you're referring to?

10          A           Can we refer to that as the Energy Star  
11 logo, because the Energy Star logo appears sometimes  
12 in print, sometimes embossed on a product, sometimes  
13 as a sticker, or I think they might be called  
14 grippers or some other types of attachments. So I  
15 don't want to talk about just one way in which the  
16 Energy Star is present. So I think we can probably  
17 agree on the definition of Energy Star logo.

18          Q           Okay. The Energy Star logo itself does  
19 not tell a consumer exactly how much energy will be  
20 used by the product?

21                   MR. DECKANT: Objection.

22                   THE WITNESS: The Energy Star logo in  
23 tandem with the Federal rules is sufficient to  
24 tell at least how minimally efficient an  
25 appliance should be.

1 BY MR. LOGAN:

2 Q But the sticker itself without the  
3 Federal rules does not contain that information?

4 MR. DECKANT: Objection.

5 THE WITNESS: Again, I -- the sticker  
6 provides a lot of information to the consumer,  
7 but the precise energy amount is not printed  
8 in the sticker. But I don't mean -- I would  
9 not like that answer to be inferred as the  
10 logo not providing that type of information to  
11 a consumer.

12 BY MR. LOGAN:

13 Q Because a consumer could look at the  
14 Federal rules and -- and make a more precise  
15 determination about what was implied by the logo?

16 A That is one thing that could happen.

17 Q You're also familiar with the energy  
18 guide label which provides some specific numbers,  
19 such as annual operating costs?

20 A I am generally familiar with energy  
21 guide labels and I believe I have reviewed the  
22 energy guide labels at issue in this case.

23 Q And how did your review of the energy  
24 guide label at issue in this case impact your  
25 analysis?



1           A           In this case I'm not sure that it did  
2           impact my analysis. I would want to go through all  
3           of those steps because there were many steps to get  
4           from Point A to the final damages calculation. But  
5           again, the best of my recollection, without going  
6           through those steps is that the energy guide label  
7           at least is not a direct input into the damage  
8           calculation.

9           Q           The Energy Star sticker by itself does  
10          not promise any particular level of energy  
11          consumption per year?

12                   MR. DECKANT: Objection.

13                   THE WITNESS: I don't agree with that  
14          characterization.

15          BY MR. LOGAN:

16          Q           So if I showed you an Energy Star  
17          sticker printed on a piece of paper, you could tell  
18          me what level of energy consumption per year was  
19          communicated by the label?

20          A           Sure. I mean, if you give me some  
21          information about what product we're talking about,  
22          I think I could easily make that determination.

23          Q           So if -- if I brought in a clothes  
24          washer and put it on the table and slapped an Energy  
25          Star logo on the front, you would be able to tell me

1 how much energy this clothes washer would consume in  
2 a year?

3 A I could tell you the maximum amount  
4 that I would expect it to consume in a year.

5 Q What would you need to know in order to  
6 make that determination?

7 A The appropriate measure of the capacity  
8 of the washing machine.

9 Q And that information is not contained  
10 on the Energy Star logo?

11 A I don't believe that information is  
12 contained directly on the Energy Star logo.

13 Q How would you go about determining the  
14 capacity of the clothes washer?

15 A I would look at various typical sources  
16 for that information, or one might actually conduct  
17 a test to determine the capacity.

18 Q And where would you go to determine how  
19 to conduct a test to determine capacity of a clothes  
20 washer?

21 A I believe we would be going back to the  
22 Federal guidelines or regulations that specify the  
23 correct way to make that determination.

24 Q And --

25 A In this case I have reviewed, for

1 example, the DOE testing that states the correct  
2 capacity used for the analysis of energy  
3 consumption.

4 Q So it's your conclusion that the DOE  
5 audit tests in this case stated the correct capacity  
6 for the clothes washer?

7 A I need you to define for me what you  
8 mean by "correct capacity."

9 Q Let me take that step by step. You're  
10 aware that the DOE conducted audit tests of the  
11 clothes washer model at issue in this case?

12 A Yes.

13 Q And did you make any determination  
14 about whether or not the DOE correctly identified  
15 the capacity of the clothes washers at issues in  
16 this case?

17 A I've not made an independent  
18 verification of that. I am relying on the Federal  
19 Government, the U.S. DOE, to appropriately apply the  
20 regulations governing the testing of the washing  
21 machines that they measure.

22 Q Do you recall -- and I might be able to  
23 show you these documents later on -- that in the  
24 audit tests conducted by the DOE contractor in this  
25 case that there were two different results for the

1 capacity that were off by, I think, one  
2 one-hundredth of a cubic foot?

3 A I don't have a memory of that as I sit  
4 here right now.

5 Q Do you recall seeing any information in  
6 this case that the DOE contractor admitted that they  
7 measured capacity incorrectly in the audit test?

8 MR. DECKANT: Objection.

9 THE WITNESS: I have seen no such  
10 evidence.

11 BY MR. LOGAN:

12 Q If you did see a document where the DOE  
13 contractor admitted that they incorrectly determined  
14 capacity in this case, would that impact your  
15 analysis?

16 MR. DECKANT: Objection.

17 THE WITNESS: It would certainly not  
18 impact my methodologies at all. I would need  
19 to review that document to make a  
20 determination about whether the outcome of my  
21 analysis would be impacted by -- by that  
22 information.

23 BY MR. LOGAN:

24 Q So the methodology wouldn't change, but  
25 the numbers might change, the calculation?

1           A           It may or may not. I would need to  
2 understand what was in the document in order to tell  
3 you.

4           Q           Does the Energy Star sticker say that  
5 the product will perform well?

6           A           Are you saying does it literally make  
7 that statement on the logo?

8           Q           Yes.

9           A           Those words are not literally on the  
10 logo.

11          Q           Do you think that quality performance  
12 is implied by the Energy Star logo?

13          A           I haven't made a particular study of  
14 that one way or the other.

15          Q           What does the logo represent for -- in  
16 terms of -- of clothes washers?

17          A           The one thing that I'm certain of is  
18 that it has a precise meaning as to a minimum amount  
19 of savings, energy savings that consumers can expect  
20 from their appliance, but I haven't conducted a  
21 detailed study of all of the potential  
22 interpretations of the Energy Star logo, nor is that  
23 material to the particular damage methodologies that  
24 I set forth at issue in this litigation.

25          Q           Do you know which Government agency

1 decides whether or not clothes washers can qualify  
2 as Energy Star?

3 A My understanding is that often the U.S.  
4 Department of Energy conducts testing, independent  
5 testing of appliances. But I believe it is the U.S.  
6 EPA that would then look at that information and,  
7 for example, make a determination to decertify, for  
8 example, the Maytag Centennial washing machines.

9 Q How does a clothes washer initially  
10 earn the Energy Star label?

11 A Again, my understanding is that  
12 manufacturers self-qualify appliances, or at least  
13 provide their own test results to the EPA in order  
14 to gain certification.

15 Q Is it your understanding that Whirlpool  
16 tested the clothes washers in this case in order to  
17 certify them as Energy Star?

18 A I don't recall one way or another  
19 whether Whirlpool actually conducted appropriate  
20 certification tests.

21 Q So you have not seen or did not rely on  
22 any documents regarding Whirlpool's initial testing  
23 of the clothes washers?

24 A You've got two questions in there.

25 Q Did you review Whirlpool's initial

1 testing of the clothes washers?

2 A I can -- as I sit here right now,  
3 again, some of these documents I haven't looked at  
4 for four months and my mind has been elsewhere. I  
5 can recall that I have seen what Whirlpool claims  
6 were the performance characteristics of the Maytag  
7 Centennial washing machines at issue in this case.  
8 But as I sit here right now, again, without going  
9 back to the documentary evidence, I don't know that  
10 I've seen particular evidence of a test, or how it  
11 was conducted one way or the other. I just don't  
12 have a memory.

13 Q So you have not made a determination,  
14 for example, that Whirlpool incorrectly tested the  
15 clothes washers at issue in this case?

16 MR. DECKANT: Objection.

17 THE WITNESS: I don't think I'm  
18 offering an opinion one way or the other. I  
19 am relying on both Plaintiffs' theory of  
20 reliability and an assumption that liability  
21 is ultimately established to understand that  
22 these washing machines should not have been  
23 certified as Energy Star, but I'm not offering  
24 an opinion one way or the other about whether  
25 that liability should be found.

1 BY MR. LOGAN:

2 Q So you -- just to clarify, you are  
3 assuming, but you have not determined, as a matter  
4 of fact that every unit of this particular model  
5 number of clothes washer should never have been  
6 labeled as Energy Star?

7 A That is Plaintiffs' theory of  
8 liability, and any textbook on how to calculate  
9 economics damages will tell you that the first step  
10 in that process is to assume liability. So yes,  
11 I've made that assumption that liability will  
12 ultimately be established.

13 That said, these methodologies can be  
14 applied to the totality of the sales of Maytag  
15 Centennial washing machines, as I illustrate with  
16 nationwide calculations, or to any subset of those  
17 washing machines. So nothing would change in my  
18 methodology if I were told by the Court that, for  
19 example, a Texas and New Jersey class was certified  
20 and not other states. Or that a class from 2010  
21 forward was certified.

22 Q Who determines what the Energy Star  
23 test procedures are?

24 A I think we've gone over this, which is  
25 that I don't have a recollection about how those



1 regulations are propounded, simply that the tests  
2 are governed by a set of regulations.

3 Q And I believe you've referred to them  
4 as DOE regulations?

5 A I don't know which agency they belong  
6 to. I know that the DOE uses those regulations, but  
7 whether they belong to the DOE or not, I -- as I sit  
8 here right now I can't testify one way or the other.

9 Q Do test procedures for Energy Star  
10 clothes washers, do those change over time, or have  
11 they always been the same?

12 A I have a vague memory that those  
13 testing procedures may change. But again, my -- my  
14 memory of that is very hazy. So I would probably  
15 say I can't really recollect one way or the other as  
16 I sit here right now. I would need to go back and  
17 review the evidence that I looked at in this case.

18 Q Do you know who determines the Energy  
19 Star cutoff level? And by that I mean how efficient  
20 a clothes washer has to be to earn the Energy Star  
21 label?

22 A Such as what I mention in my  
23 Declaration, the 37 percent energy savings and  
24 50 percent less water based upon the Federal maximum  
25 standards.

1           Q       Do you know who makes that  
2       determination of 37 and 50?

3           A       As I sit here right now I don't recall  
4       one way or another.

5           Q       Do you know if the Energy Star cutoff  
6       level ever changes or if it has always been 37 and  
7       50?

8           A       I know that it is 37 and 50 during the  
9       certification period for the washing machines at  
10      issue here. Beyond that I don't have a memory of  
11      whether those marks have changed.

12          Q       If I represented to you that, in fact,  
13      the Energy Star cutoff level has gradually increased  
14      over the years, that wouldn't surprise you?

15          A       I would take your word for it.

16          Q       So a clothes washer that was tested  
17      under the 2016 standard versus the 1997 standard --  
18      let me -- let me rephrase this, this question.

19                   A clothes washer that would meet Energy  
20      Star under 1997 regulations might not meet Energy  
21      Star under 2016 regulations?

22          A       I don't have enough information in that  
23      question to be able to answer that.

24          Q       If you wanted to determine if a clothes  
25      washer met the Energy Star standard in 1997, you

1 would need information about what the regulation and  
2 test procedures were in 1997?

3 A You may or you may not need that  
4 information.

5 Q Do you know if the average consumer  
6 keeps up with Energy Star cutoff levels?

7 MR. DECKANT: Objection, lack of  
8 foundation.

9 THE WITNESS: That information is not  
10 relevant for the two types of damages that  
11 I've calculated here today so I haven't made  
12 an inquiry to make that discovery.

13 BY MR. LOGAN:

14 Q Might an individual consumer's  
15 understanding of Energy Star change over time?

16 MR. DECKANT: Objection.

17 THE WITNESS: Again, I've made no study  
18 of individual consumers in this case. There  
19 is no need to do so. The appropriate  
20 understanding, at least for -- well, the  
21 appropriate understanding of both types of  
22 damage methodologies relates to a class-wide  
23 analysis and vis-a-vis price premium. We need  
24 to understand in market wide price premium and  
25 not what any one individual consumer thinks.

1           Every consumer is harmed by virtue of paying a  
2           marketplace price premium regardless of what  
3           they think about the Energy Star logo.

4       BY MR. LOGAN:

5           Q       Do you have any understanding of the  
6           requirement of an Energy Star logo to be displayed  
7           for qualified machines?

8           A       I don't understand that question.

9           Q       Once an -- once Energy Star approval is  
10          earned, is it mandatory for the Energy Star logo to  
11          be displayed?

12          A       I don't believe that it's mandatory,  
13          but the information that I've seen would indicate  
14          that there is widespread understanding of the value  
15          of the Energy Star in terms of both retailers and  
16          wholesalers, and I've seen no evidence that those  
17          that earn the Energy Star aren't extremely eager to  
18          display it in customer-in store collateral websites,  
19          advertisements and the like.

20          Q       When Energy Star standards change, and  
21          there are still in stock older Energy Star machines  
22          that do not meet the new standards, do you have any  
23          knowledge about what happens to those machines?

24          A       Can I hear that question back, please?

25                   (At which time the following question

1 was read back by the reporter:

2 "Question: When Energy Star standards  
3 change, and there are still in stock older  
4 Energy Star machines that do not meet the new  
5 standards, do you have any knowledge about  
6 what happens to those machines?")

7 MR. DECKANT: Objection.

8 THE WITNESS: Your question is a little  
9 too vague for me to answer.

10 BY MR. LOGAN:

11 Q Well, we already discussed how Energy  
12 Star standards might change from time to time and  
13 have gradually increased over the years. My  
14 question is, if you have a particular model of -- of  
15 clothes washer that was Energy Star certified, under  
16 the standard then in existence and then the standard  
17 changed, do you know what happens with these old  
18 machines that are no longer -- meet the new  
19 standard?

20 A Right, and what I'm saying is that what  
21 happens is such a broad term to me that I have no  
22 idea what you're trying to ask.

23 Q Are the -- can retailers still sell  
24 them with the Energy Star label on them?

25 MR. DECKANT: Objection.

1 THE WITNESS: Again, I would need to  
2 refresh my recollection on that. As I sit  
3 here right now, I'm not sure.

4 BY MR. LOGAN:

5 Q Let's go back to the Energy Star test  
6 procedures at the time that these clothes washers at  
7 issue were certified. I believe that you set out  
8 the formula in -- in your report in paragraphs 9,  
9 10, and 11. I'll give you a second to review that.

10 Is your recollection that as part of  
11 the Energy Star tests that were conducted in this  
12 case energy consumption of the clothes washer would  
13 need to be measured?

14 A I'm sorry. I was reading the document  
15 when you started that question, so if you would  
16 please ask it again, I would appreciate that.

17 Q Sure. I can -- as part of the Energy  
18 Star test, energy consumption needs to be measured;  
19 is that correct?

20 A That is part of the test.

21 Q And water consumption?

22 A Correct.

23 Q And --

24 A Let me just back up. The way I use the  
25 term "energy" relates to water consumption. So if

1 we could be on the same page of talking about either  
2 electricity, gas or water, because I view the term  
3 "energy" to relate to water consumption.

4 Q The Energy Star test for clothes  
5 washers has an MEF, a modified energy factor, and a  
6 WF, a water factor. You're -- you see that?

7 A I'm aware of both of those terms.

8 Q And the modified energy factor is  
9 focused on electricity and the water factor is  
10 focused on -- on water; is that your understanding?

11 A That's my understanding.

12 Q You also, in paragraph 10, refer to  
13 drying energy.

14 A Yes.

15 Q What do you -- what is your  
16 understanding of how drying energy fits into the  
17 Energy Star calculation?

18 A I'll do the best to do this off the top  
19 of my head, although I would strongly advise you  
20 that if you have workpapers or the regulations that  
21 I might be able to give you better testimony with  
22 that. So subject to that caveat and the fact that I  
23 may need to revise this, my memory of the MEF is  
24 that you take -- MEF is equal to the capacity  
25 divided by the energy used by the washing machine --

1     sorry, the electricity used by the washing machine  
2     directly plus a drying use factor that is calculated  
3     for that washing machine, and that you need to  
4     isolate -- you can isolate out each of those  
5     subcomponent parts of the energy consumption.

6             And in, you know, math going back and  
7     forth you can calculate the MEF by MEF divided by --  
8     MEF is the -- yes, if you take the capacity and you  
9     know the drying use factor and the energy consumed  
10    you add the drying factor, plus the energy consumed  
11    and divide that into the capacity to get the MEF.

12            Q       So I guess what I am trying to get at  
13    here -- and thank you for that. I -- I think all of  
14    that was -- was accurate. You -- you need to know  
15    capacity, energy and drying energy? Those are  
16    the -- the three big variables in the calculation of  
17    MEF?

18            A       I think that's correct.

19            Q       When you were doing your analysis for  
20    this case, and you looked at the DOE audit results,  
21    did you rely on what the DOE found to be the  
22    capacity energy consumption and drying energy for  
23    these clothes washers?

24            A       For purposes of the DOE results, I've  
25    looked at the capacity used by the DOE. I looked at



1 the electricity used as measured in the test. And  
2 without looking at my workpapers, I don't recall  
3 whether the test results included a drying use  
4 factor or whether I recalculated that. But the  
5 drying use factor I believe is a mathematical  
6 constant that can be determined from the  
7 regulations. The drying use factor is not something  
8 that is measured by the test.

9 (Off-record discussion.)

10 BY MR. LOGAN:

11 Q Clothes washers under the Energy Star  
12 test are tested on the, quote/unquote, normal cycle;  
13 is that your recollection?

14 A I don't have a particular recollection  
15 as I sit here today. I would have to go back and  
16 look at the testing procedures.

17 Q I'll represent to you that they are  
18 tested on the normal cycle at various sizes. The  
19 clothes washers here had different settings such as  
20 heavy duty and delicate. Do you know if those were  
21 tested as well?

22 A Again, without looking back at the test  
23 results, I don't have a specific recollection.  
24 Though whether or not those settings were tested  
25 does not change my opinions in this case.

1           Q       Well, if those settings were -- were  
2       not tested in this case and a consumer used those  
3       settings, then the consumer might not be getting the  
4       efficiencies implied by the Energy Star logo; isn't  
5       that true?

6                   MR. DECKANT:  Objection.

7                   THE WITNESS:  That's well beyond the  
8       scope of my assignment, which is to calculate  
9       class-wide damages in this case, and the DOE  
10      test rules and the Energy Star certification  
11      are designed to apply broadly over a large  
12      either class or population of individuals and  
13      over a fleet of appliances.  So I don't think  
14      that the -- I don't think that any one  
15      individual's circumstances matter for purposes  
16      of calculation of class-wide damages in this  
17      case.

18      BY MR. LOGAN:

19           Q       Well, let me -- let me push back on  
20      that because if the Energy Star tests are only  
21      focused on the normal setting and not other settings  
22      and that a consumer takes the product and uses it in  
23      other settings that have not been tested, then the  
24      consumer need not necessarily expect that they would  
25      have received the efficiencies implied by the Energy

1 Star logo because those were not tested; isn't that  
2 right?

3 MR. DECKANT: Objection.

4 THE WITNESS: I, again, don't agree  
5 with your characterization and would state  
6 that on a class-wide basis the results of the  
7 DOE test which are intended to apply to all of  
8 the appliances in a particular either model or  
9 category and the information that is provided  
10 both to the EPA and to all of the consumers  
11 that that information is intended to apply  
12 across a broad population of -- of consumers.

13 BY MR. LOGAN:

14 Q But the DOE test procedures does not  
15 provide that every setting on a clothes washer is  
16 tested; isn't that correct?

17 A Again, I don't recollect the precision  
18 of the DOE testing. If you want to mark that  
19 document, we can talk about it. But my  
20 understanding of the DOE test results is that the  
21 test is designed to provide information that's  
22 useful to all consumers in the aggregate and to  
23 allow a determination to be made about all units of  
24 a particular appliance.

25 Q Is it your position that the DOE

1 looked -- well, strike that.

2 Have you seen information in this case  
3 that the clothes washer at issue were disqualified  
4 from the Energy Star program by the EPA?

5 A I know that that is Plaintiffs'  
6 allegation in the case, but as I sit here today, I  
7 don't recall what documentary evidence, if any, I  
8 have seen that that is the case.

9 Q And as we previously discussed, you are  
10 assuming liability so you make no determination if  
11 the clothes washers at issue were disqualified by  
12 the EPA?

13 A I've made no independent verification  
14 of that detail because that is Plaintiffs' theory of  
15 liability and I have matched my damages theories to  
16 Plaintiffs' theory of liability and an assumption  
17 that that liability is ultimately established. And  
18 what we also talked about earlier today is that my  
19 methodologies do not change if some subset of the  
20 washing machines are found to have been certified  
21 that may change the result of the calculations, but  
22 if the Court says anything after 2010 is in the  
23 class and anything before is not, the methods that I  
24 provide are just as workable. We would just take  
25 the data for the prescribed class and obtain results

1 in that manner.

2 Q According to the DOE audit tests that  
3 you reviewed in -- in this case, were the clothes  
4 washers more efficient than the minimum Federal  
5 efficiency standards mandated?

6 A Again, if you want to put those in  
7 front of me, I can look at that, but I don't have a  
8 recollection one way or the other.

9 Q Do you recall how close these clothes  
10 washers were to meeting the Energy Star standard as  
11 tested by the DOE?

12 A I'm sorry. I just don't have a  
13 recollection of what those documents showed, but  
14 those documents speak for themselves.

15 Q Well, why don't we look at the energy  
16 expense damages that you calculate here. Could you  
17 summarize what you were trying to accomplish with  
18 the calculation of energy expense damages?

19 A At a broad level what I sought to do is  
20 measure the additional expense that consumers will  
21 bear as a result of operating these machines at the  
22 less efficient tested level rather than the minimum  
23 guaranteed level indicated by the Energy Star  
24 certification.

25 Q So if we look at Table 1 we see the --

1 one column for the Energy Star standard and one  
2 column for the U.S. DOE result.

3 Do you see that?

4 A Yes.

5 Q And your calculation of energy expense  
6 damages depends upon the annual difference between  
7 these two numbers, the Energy Star standard and the  
8 DOE result?

9 A I guess I would say that it depends on  
10 the difference between those measurements, but  
11 whether you express it on an annual basis or a  
12 monthly basis doesn't really matter. Or any other  
13 basis.

14 Q So a clothes washer could, for example,  
15 miss the Energy Star standard by a very small  
16 amount, say ten cents a year, or it could miss it by  
17 a mile, say \$100 per year. Does that -- does that  
18 make sense?

19 A Well, I would view it as it missed by X  
20 amount of energy or X amount of water rather than  
21 the dollars. Ultimately I guess you can translate  
22 that into dollars, but I believe the -- the testing  
23 results are based on electricity and water  
24 consumption rather than dollars.

25 Q So for the -- the energy expense

1 damages you don't just look at Energy Star versus  
2 non-Energy Star, you look at Energy Star versus the  
3 DOE result in terms of by how much the tested model  
4 missed the Energy Star standard?

5 A That's correct. I'm not looking at,  
6 say, the Federal required standard versus the Energy  
7 Star logo. But again, the methodology that I  
8 provide here could be used with any two goal posts,  
9 the Energy Star minimum amount, the advertised  
10 amount to the extent that that is available, and the  
11 U.S. DOE test or some other factor as a -- as a  
12 comparison.

13 Q Okay. For the price premium model, it  
14 seems to me that the data that you are looking at is  
15 comparing Energy Star versus non-Energy Star.  
16 You're not looking at questions of degree, like, for  
17 example, how close the non-Energy Star is to Energy  
18 Star. Is that fair?

19 A I don't know whether it's fair or not.

20 Q Well, in -- in the deposition we did a  
21 few years ago in the DeiRossi KitchenAid case, I  
22 recall you saying that Energy Star is binary, that  
23 it was either present or it is absent.

24 Does that -- do you recall that?

25 A I would agree with that, yes.

1           Q       And so for the price premium model in  
2       this case you would say that the -- that Energy Star  
3       is binary; is that right?

4           A       Correct. So I would want the record to  
5       reflect that energy expense damages and price  
6       premium damages are, although related to the same  
7       conduct, very different in their nature and very  
8       different in the way that it's economically  
9       appropriate to calculate them. And I would agree  
10      that for purposes of price premium damages, the  
11      correct way to view the Energy Star logo or  
12      certification is with the binary perspective.

13                 A product is either qualified or it is  
14      not. To the best of my recollection, at least  
15      during the time period at issue in this case, you  
16      couldn't have a product that was half Energy Star or  
17      ultra Energy Star. You either have the  
18      certification or you don't. And so the correct  
19      method for measuring damages would be how much did  
20      consumers pay as a direct result of the presence of  
21      the Energy Star certification.

22           Q       I guess I'm confused. Why is it  
23       appropriate to evaluate questions of degrees in the  
24       energy expense damages and assume Energy Star is  
25       binary for price premium damages?



1           A           Because the impacts of the defendants'  
2     conduct are different under each style of damages.  
3     So when a consumer goes to a store and is going to  
4     buy one of these washing machines, it is either  
5     Energy Star compliant or not. And the market price  
6     for that washing machine is going to reflect the  
7     presence or absence of that label because it is a  
8     binary condition. Again, there are -- Energy Star,  
9     at least to the best of my understanding, is not  
10    measured in degrees.

11                    When we look at energy expense damages  
12    we're not looking at the price that was paid simply  
13    because the logo was present or not present, we're  
14    looking at how much additional energy is the class  
15    going to expend on operating these washing machines  
16    as a result of the machines not being as efficient  
17    as indicated by the Energy Star certification.

18           Q           So for your price premium model, since  
19    you are only looking at Energy Star versus  
20    non-Energy Star, the price premium calculation would  
21    be the same for a clothes washer that missed Energy  
22    Star by .1 percent or by 50 percent?

23           A           I don't know that I've made that  
24    determination in this case. What I'm telling you is  
25    that the price premium for all of the Maytag

1 Centennial washing machines is as calculated by  
2 Whirlpool, Dr. Sukumar, or Dr. Dennis.

3 Q In the price premium calculations in  
4 your report, there is no mention of how close these  
5 clothes washers were to Energy Star; isn't that  
6 right? So therefore, it's fair to say since the  
7 result of the DOE test doesn't matter, it doesn't  
8 matter if it's .1 percent off of Energy Star or  
9 50 percent off of Energy Star?

10 A I'll need to hear the question read  
11 back, please.

12 Q Let me -- let me rephrase it.

13 The -- you -- you agree that the degree  
14 to which the clothes washers missed Energy Star,  
15 according to the DOE test, did not play into the  
16 calculation of price premium damages?

17 A I believe that's accurate.

18 Q Okay. All right. Why might someone  
19 want to buy an Energy Star clothes washer over a  
20 non-energy Star clothes washer?

21 A That's not really part of the scope of  
22 my assignment here and I haven't conducted a  
23 detailed study of -- of that particular issue.  
24 Again, due to the binary nature of the Energy Star  
25 certification, again, individual reasons for

1 purchase have no impact on the measurement of price  
2 premium damages in a case like this.

3 Q A person might buy an Energy Star  
4 clothes washer in order to save money on utility  
5 bills?

6 A Again, I haven't made a particular  
7 study, so I'm not going to be able to testify about  
8 individual reasons except to say that I've given  
9 some consideration about whether individual reasons  
10 should matter and they do not matter in this case.  
11 And there's no impact on the calculation of price  
12 premium damages regardless of what consumers think  
13 individually about the Energy Star.

14 Q When you -- let me take a step back.  
15 You're aware of programs that provide  
16 tax benefits or rebates related to the purchase of  
17 an Energy Star appliance; is that right?

18 A I would say I'm at a very high level  
19 aware of tax rebates, credits or however you've  
20 described it as being aware for energy efficient  
21 items, but I don't know whether the Energy Star  
22 itself or the Energy Star certification plays into  
23 any of those rebates.

24 Q Did you evaluate whether or not the  
25 availability of rebates impacts the analysis in your

1 report?

2 A Can I hear that back, please?

3 Q That was an extraordinarily poorly  
4 phrased question.

5 THE REPORTER: Do you want it read  
6 back?

7 MR. LOGAN: No, never read that back.

8 BY MR. LOGAN:

9 Q The availability of rebates does not --  
10 is not mentioned in your report; is that correct?

11 A I think the document speaks for itself.

12 Q Is there a reason that you chose not to  
13 include an analysis of rebates?

14 A Yes.

15 Q What is that reason?

16 A It would be inappropriate to include an  
17 analysis of rebates or other such, however you've  
18 described them, because again of the binary nature  
19 of the Energy Star, it's either present or not  
20 present, and the value in the marketplace is going  
21 to be determined based upon its presence or absence.

22 Sorry. Let me just -- let me add to  
23 that, which is that the harm and damage caused by  
24 Whirlpool as a result of selling machines that are  
25 labeled as being Energy Star certified and allegedly

1 not certified doesn't change whether or not any one  
2 individual or group of individuals receives any kind  
3 of rebate. And so when we're measuring class-wide  
4 damages as a result of a defendant's conduct, it  
5 would be inappropriate to consider those -- those  
6 particular issues. There's no need to consider  
7 them.

8 Q See, I don't know if that's right  
9 because where we talked about, in terms of  
10 calculating damages, it was between what was  
11 promised and what was delivered. And if what was  
12 promised included the availability of a rebate,  
13 would you not need to consider whether or not the  
14 consumer actually received that rebate?

15 A First of all, I disagree with your  
16 characterization of our prior conversations. What I  
17 would say is the appropriate measure of damage in  
18 this case, as it relates to price premium damage, is  
19 the amount of price premium, the class members in  
20 the aggregate, the class has paid as a direct result  
21 of defendants' conduct of labeling these washing  
22 machines as Energy Star certified when, in fact,  
23 they were not.

24 And the presence or absence of rebates  
25 does not impact that measurement of the marketplace

1 price premium extant for the Energy Star. Let me --  
2 I think I misstated that.

3 The receipt of any such rebates by any  
4 one individual does not impact the marketplace price  
5 premium attributable to the Energy Star in this  
6 case.

7 Q Isn't it the case that consumers might  
8 be willing to pay a price premium for an Energy Star  
9 product if they knew that there was a cash rebate  
10 that they would receive for doing so?

11 MR. DECKANT: Objection.

12 THE WITNESS: I haven't made a study  
13 one way or the other. I've seen no such  
14 evidence in this case that that is -- that  
15 that is actually true, and it has no bearing  
16 on the calculation of the market place price  
17 premium that consumers actually paid as a  
18 direct result of defendants' conduct.

19 BY MR. LOGAN:

20 Q I want to talk briefly -- we covered a  
21 little bit of this before, but I want to talk  
22 briefly about your relationship with Drs. Sukumar  
23 and Dennis.

24 You said you had worked with them  
25 previously on cases; is that true?

1           A           Yes.

2           Q           Do you recall about how many times you  
3           have done so for each?

4           A           I've worked with Dr. Sukumar on one  
5           other occasion. I've worked with Dr. Dennis on many  
6           occasions. I would have to do a tabulation to give  
7           you an accurate count of that. But more than once  
8           or twice.

9           Q           Did you supervise their work in this  
10          case?

11          A           I would not describe my role in this  
12          case as having been supervisory as to Dr. Sukumar  
13          and Dr. Dennis. I did have conversations with them  
14          about their work product and I had conversations  
15          with them about how I intended to use their work  
16          product that I understand led to the development of  
17          their surveys and the results therefrom.

18          Q           Did you call for a contingent and  
19          conjoint survey in this case in order to help assist  
20          you in -- in what you were doing?

21          A           I don't think I was the only person  
22          that said let's do contingent valuation and/or  
23          conjoint. Those are methods that I commonly suggest  
24          in terms of methods by which a price premium may  
25          be -- may be calculated. But again, I don't recall

1 being the one who said let's use these  
2 methodologies. I think that was probably a joint  
3 decision amongst all of the professionals working  
4 together and it seemed like a reasonable judgment to  
5 me.

6 Q So regardless of its origins, you agree  
7 that contingent valuation and conjoint analysis are  
8 appropriate for this case and you're relying on the  
9 work of Drs. Dennis and Sukumar in order to  
10 calculate the price premium?

11 A Again, if you can break your questions  
12 into single questions, I would appreciate that.

13 Q You agreed that contingent and conjoint  
14 analyses were appropriate in this case?

15 A Yes, I believe those are two  
16 appropriate methods that may be used to determine a  
17 price premium in this case.

18 Q Okay. In previous cases where you and  
19 I have been involved, you've recommended hedonic  
20 regression in order to isolate a price premium, and  
21 yet you -- your report in this case does not make  
22 that recommendation. Is that accurate?

23 A I think it is literally true that in  
24 another case that I've worked on that you've been  
25 involved with I suggested the technique of hedonic



1 regression, and that in this case I have not overtly  
2 made that recommendation.

3 Q Did you determine that hedonic  
4 regression would not be appropriate in this case?

5 A To the best of my recollection I did  
6 not make a determination one way or the other about  
7 the usability of hedonic regression in this case.

8 Q Why did you not use hedonic regression  
9 in this case?

10 A What I would say is that in many cases,  
11 other than this particular one, I often advocate  
12 hedonic regression, conjoint evaluation and  
13 contingent valuation methodology as being perfectly  
14 equivalent substances. I'm happy with any of them,  
15 at least under certain circumstances.

16 And so I don't know that I have a  
17 particular reason why hedonic regression was not  
18 part of my analysis in this case. Again, I don't  
19 have a particular memory one way or the other of it  
20 coming up at all, and I don't, at least without  
21 doing some additional work, have an opinion that it  
22 is or is not suitable here. It's just that I've  
23 relied upon two other methods that I regularly  
24 testify about as alternates for ways to calculate  
25 the price premium in this litigation.

1           Q       Well, in the -- in the KitchenAid case  
2       you said in your report that the use of hedonic  
3       regression was the ideal way of calculating the  
4       price premium attributed to Energy Star.

5                    So my question is, what changed? Why  
6       is it that it was ideal in that case and you don't  
7       even mention it here?

8           A       Do you have a copy of that report? I  
9       would love to see the exact words that I used.

10          Q       I could probably pull it up on my  
11       computer, but I'll represent to you it was the word  
12       "ideal."

13          A       Well, I suspect that the word "ideal"  
14       may have been used, but it's the context of the  
15       surrounding words that I'd like to understand before  
16       I answer that question.

17          Q       Well, based on your memory, why was  
18       hedonic regression suggested in the DeiRossi case  
19       and not here?

20          A       Well, again, my memory of what I said  
21       in the DeiRossi case would be that hedonic  
22       regression is an ideal method. And as I've  
23       testified now in numerous litigations, I have  
24       testified that hedonic regression, conjoint and  
25       contingent valuation methods are substitutable

1 methods of reaching the same evaluation.

2 And I don't have a memory one way or  
3 another of a specific determination as to hedonic  
4 regression in this specific case other than that I  
5 don't find -- I'm not choosing contingent valuation  
6 and/or contingent valuation joint analysis as being  
7 second best to hedonic regression. I believe  
8 they're substitutable techniques when all three  
9 techniques can be performed.

10 Q So you have not -- sorry. One second.

11 MR. DECKANT: I just want to ensure  
12 here while we're taking a momentary break.  
13 You've been talking about some testimony you  
14 gave in the DeiRossi matter, I believe. Are  
15 you subject to a non-disclosure agreement or a  
16 confidentiality undertaking in that matter? I  
17 just don't know off the top of my head.

18 THE WITNESS: I probably am.

19 MR. LOGAN: My memory is that the  
20 report in DeiRossi was -- was filed under  
21 seal. So we will keep that in mind when we're  
22 reviewing the transcript in this case. But, I  
23 mean, everyone here has read it, obviously, so  
24 I'm not too concerned about anyone's ears  
25 catching fire in this ear.

1 MR. DECKANT: Well, there is a little  
2 bit of an intricacy in that Bursor and Fisher  
3 and Faruqi & Faruqi were appointed co-counsel,  
4 I believe, in the DeiRossi matter and Anthony  
5 Vozzolo is currently with Vozzolo LLC instead  
6 of Faruqi & Faruqi.

7 MR. LOGAN: I will happily waive any  
8 sort of confidentiality as to Mr. Vozzolo. I  
9 don't view it as terribly significant that he  
10 changed firms for the purposes of looking at  
11 the -- Mr. Weir's report in the DeiRossi case.  
12 Although I'm sure it's significant for many  
13 other reasons.

14 BY MR. LOGAN:

15 Q I'll -- I'll move on from -- from the  
16 DeiRossi case.

17 I want to just clarify your testimony  
18 as to why hedonic regression was not recommended in  
19 this case, and I believe your testimony is you don't  
20 remember. Is that fair?

21 A What you've -- that's a little bit of a  
22 mischaracterization because it's not that I made a  
23 recommendation against hedonic regression and don't  
24 remember it. What I've said is I don't remember  
25 making an evaluation about hedonic regression one

1 way or the other in this case.

2 Q You do not recall recommending hedonic  
3 regression in this case?

4 A I don't have a recollection one way or  
5 the other.

6 Q And you do not recall not making a  
7 recommendation of hedonic regression in this case?

8 A That's correct, I have no memory of  
9 that one way or the other.

10 Q Do you recall an earlier draft version  
11 of the report where you did recommend hedonic  
12 regression?

13 MR. DECKANT: Draft versions of the  
14 report are protected for disclosure under  
15 Rule 26.

16 MR. LOGAN: I am not asking for  
17 disclosure of the draft report.

18 BY MR. LOGAN:

19 Q I -- I want to know if you checked your  
20 records, would you be able to determine if you  
21 recommended hedonic regression in this case?

22 MR. DECKANT: Wouldn't that also be  
23 asking about work product?

24 BY MR. LOGAN:

25 Q I'm asking about your memory. Do you

1 remember a determination about hedonic regression in  
2 this case?

3 A I've told you that I don't remember a  
4 determination about hedonic regression in this case.  
5 That's precisely what I've said four times now.

6 Q Well, now that -- now that we have  
7 brought it up, do you think hedonic regression would  
8 be a good method to calculate price premium in this  
9 case?

10 A I would need to give some additional  
11 consideration to that. What I said already today  
12 and would be happy to say is that when the  
13 circumstances are right and the requisite  
14 information is available, I view hedonic regression,  
15 conjoint analysis and contingent valuation to be  
16 economically and statistically valid and equivalent  
17 ways to develop a price premium methodology, and I  
18 don't per se have a preference for one or the other  
19 or believe that one or the other will provide a more  
20 accurate result.

21 Q I believe we've been talking about a  
22 determination about hedonic regression in this case.  
23 Let me rephrase it.

24 Did you consider using hedonic  
25 regression in this case?

1           A           I don't have a memory one way or the  
2     other.

3           Q           Okay. You calculate two different  
4     types of damages in this case which you've labeled  
5     as energy expense damages, which I recall you saying  
6     that includes water, as well as price premium  
7     damages; is that fair?

8           A           Those are the two high level categories  
9     of damages that I set forth in my Declaration.

10          Q           Why did you set forth two high level  
11     categories of damages instead of one?

12          A           I believe there are multiple legal  
13     theories of liability in this case where either one  
14     of these, or perhaps both, would be called for as  
15     measures of damage. Specifically I believe that  
16     Plaintiffs allege that the class has paid too much  
17     for the products as a result of the improper  
18     labeling of the Energy Star logo on these washing  
19     machines. So my understanding would be that  
20     generates a need for price premium damages if  
21     liability is established.

22                   And I believe Plaintiffs also assert  
23     that on an ongoing basis the class pays additional  
24     amounts for energy as a result of the lowered  
25     efficiency of these washing machines, and as a

1 result of those particular claims, the measurement  
2 of the energy expense damages would be appropriate.  
3 But, again, we're wavering into what I understand to  
4 be a legal determination of which theories of  
5 liability are allowed or approved vis-a-vis the  
6 causes for action which are, you know, beyond my pay  
7 grade as an economist.

8 But, again, I tried to set forth damage  
9 calculations. I believe I succeeded in setting  
10 forth damage calculations that comport with my  
11 understanding of multiple theories of liability set  
12 forth by the Plaintiffs.

13 Q Is it your opinion that the class would  
14 be entitled to both types of damages in this case?

15 A Can you tell me what you mean by  
16 "entitled"?

17 Q If let's say there is a hearing class  
18 certification and the judge asks you should the  
19 class receive both energy expense damages and price  
20 premium damages, is that your testimony?

21 A And there's no consideration of what  
22 the law may allow for or anything like that, we're  
23 just talking about as an economic basis?

24 Q What -- I'm asking what your opinion  
25 is, regardless of what the law says.



1           A           Okay. It's my opinion that the class  
2           should at least be eligible to receive both types of  
3           damages because first when the Plaintiffs went into  
4           a store and bought these washing machines, they  
5           opened their wallets and paid a price premium as a  
6           result of their buying a product that was  
7           inappropriately labeled as Energy Star certified and  
8           continued to open their wallets on a monthly basis  
9           to pay higher water bills and electricity bills and  
10          perhaps other energy bills to continue to operate  
11          those machines.

12          Q           If -- if a class member is compensated  
13          for the price premium, that would put that class  
14          member in a economic position such that they did not  
15          buy an Energy Star clothes washer, but instead  
16          bought a conventional one; isn't that fair?

17          A           I don't know whether that's fair or  
18          not.

19          Q           If -- the price premium damages are  
20          designed to compensate putative class members for  
21          initial overpayment. That's -- that's fair?

22          A           I don't know whether it's fair or not.

23          Q           Is that your opinion?

24          A           My opinion is that price premium  
25          damages are intended to compensate consumers for the

1 price premium that they paid as a result of the  
2 products being labeled as Energy Star certified when  
3 they were not.

4 Q Had the product not been labeled as  
5 Energy Star, it's your opinion that the putative  
6 class members would have paid less for the products?

7 A My opinion is simply that they paid a  
8 price premium that existed in the marketplace as a  
9 result of the Energy Star certification being made  
10 when it should not have been made.

11 Q Had the Energy Star logo not been  
12 there, they might have paid the same amount?

13 A I haven't made an evaluation of what  
14 might have happened. If we went back in time and we  
15 did something else, the calculations that I've made  
16 are to understand the price premiums that consumers  
17 actually paid as a result of defendants' conduct of  
18 labeling these consumers with the Energy Star  
19 certification when, in fact, they were non-Energy  
20 Star certified.

21 Q So it's your opinion that the market  
22 charged a premium for this clothes washer because it  
23 contained the Energy Star logo?

24 A The market charged and consumers paid a  
25 price premium because this was labeled as an Energy

1 Star certified washing machine when, in fact, it was  
2 not.

3 Q And when we talk about that premium, is  
4 that a premium in comparison to a clothes washer  
5 that does not have the Energy Star logo?

6 A It is a premium that's calculated based  
7 upon the actual sales transaction that took place.  
8 It's the price premium that consumers actually paid  
9 in the marketplace when they went to the store and  
10 bought these washing machines.

11 You've asked me to notify if I'd like  
12 to take a break in a few minutes, and I certainly  
13 don't mind answering a few more questions, but I'm  
14 getting near wanting to take a five-minute break.

15 MR. LOGAN: Well, it's 12:30. Should  
16 we do a short lunch here?

17 MR. DECKANT: Sure. Yeah.

18 MR. LOGAN: I'm fine with that.

19 MR. DECKANT: Okay.

20 MR. LOGAN: All right. Let's go off  
21 the record.

22 VIDEO OPERATOR: The time is  
23 approximately 12:32. We're going off the  
24 record.

25 (Brief recess.)

1 VIDEO OPERATOR: Okay. The time is  
2 approximately 1:26.

3 We are back on the record.

4 (Document WDZ0009099 to WDZ0009100 was  
5 marked Weir-4 for identification.)

6 BY MR. LOGAN:

7 Q The court reporter has marked for you  
8 Exhibit 4, which is a document Bates-labeled  
9 WDZ0009099 to - 9100. It's cited in Footnote 8 of  
10 your report. You can put it aside for now. I'll  
11 come back to it in a few minutes. I just wanted to  
12 get that on the record.

13 A Okay.

14 Q Before we broke for lunch we were  
15 starting to have a discussion about the -- how the  
16 two methodologies --

17 MR. LOGAN: Can we go off record for  
18 one second?

19 MR. DECKANT: Sure.

20 VIDEO OPERATOR: It's approximately  
21 1:27.

22 We're off the record.

23 (Brief recess.)

24 VIDEO OPERATOR: Okay. It's  
25 approximately 1:40.

1                   We're back on the record.

2       BY MR. LOGAN:

3           Q       Mr. Weir, before lunch we were  
4       discussing energy expense damages versus price  
5       premium damages, and I was trying to elicit your  
6       opinion on whether your proposal is that both of  
7       these types of damages should be used together.

8                   Is that your recommendation or are you  
9       saying it should be one or the other? Could you --  
10      just so we have a clean record here, could you  
11      clarify your opinion on -- on this matter?

12           A       Sure. I think the conversation that we  
13      had before was whether or not it could be  
14      appropriate to use both of these methods. And my  
15      answer at the high level is yes, I believe it is  
16      economically appropriate should all of the other  
17      necessary factors of the case play out to grant  
18      consumers both of these methods of damages.

19                   And I think you posed a hypothetical,  
20      if the judge said to you what would your  
21      recommendation be, I would have no problem  
22      recommending that, again, all else equal, both of  
23      these methods could be used. But I would also  
24      testify that if, for whatever reason, as to the law  
25      or only one claim gets made, both of these are

1 stand-alone measures and they're calculated  
2 separately and independently of one another. So if  
3 Plaintiffs prevail on only one of their theories of  
4 liability, these two damages aren't necessarily  
5 intrinsically tied together. I would feel  
6 comfortable saying that you could award just the  
7 one, if that's how the law dictates would be most  
8 appropriate.

9 Q Now, in your answer you talked about  
10 different theories of liability. Are -- are you  
11 referring to the legal claims and the causes of  
12 action in the Complaint?

13 A As I understand them as a non-lawyer,  
14 yes. And I think I've summarized them earlier  
15 today, but I'll do another go-round on that. I  
16 believe one theory of liability is that Plaintiffs  
17 allege that the class members have paid too much for  
18 these washing machines because -- or they paid a  
19 price premium for the machines because Defendants  
20 labeled these washing machines as Energy Star  
21 certified when, in fact, they were not.

22 And a second theory of liability is  
23 that consumers are paying additional amounts for  
24 energy above and beyond what they should have  
25 because the washing machines are not as energy

1 efficient. And, again, I use "energy" to refer both  
2 to electricity and water and other types of energy.  
3 They're not as energy efficient as they should have  
4 been had they been appropriately Energy Star  
5 certified.

6 Q And so your opinion is that if  
7 Plaintiffs prove both of their theories of  
8 liability, then your recommendation to the Court  
9 would be that the class is entitled to both types of  
10 damages?

11 A I think the way that you've used the  
12 word "entitled," I would say yes. I would tell the  
13 judge and the jury that the Plaintiffs are entitled  
14 to both. How the judge and/or jury then makes that  
15 decision, I'm not going to advise them one way or  
16 the other, but I would say if they chose to only  
17 apply one, again because of the circumstances of the  
18 law or the jury instructions or -- or whatnot, that  
19 that would -- that would certainly not be  
20 inappropriate to award just one. But that  
21 Plaintiffs are entitled to both.

22 Q Is there an economically principled  
23 reason to prefer one or the other damages types?

24 A No, which is why I would say they're  
25 entitled to both.

1           Q       Before we -- we broke, the court  
2       reporter marked Exhibit 4. I believe I read the  
3       Bates label of that. I also want you to get out  
4       Exhibit 1 and turn to the energy expense damages  
5       section. I'd like to run through the assumptions  
6       that you made here and the calculations and the  
7       source data for these calculations.

8                    You see that you cite Exhibit 4 in  
9       Footnote 8. Do you see that?

10          A       Just so that the record is completely  
11       clear, I cite three documents in Footnote 8, and  
12       Exhibit 4 is only one of them.

13          Q       Is one. Okay.

14                   And so the numbers that you have used  
15       in order to populate the -- the equation for -- for  
16       Energy Star, those came from these exhibits that are  
17       cited in Footnote 8?

18          A       What I would tell you is that the  
19       numbers in Table 1, for example, are best said to  
20       can derived from a worksheet which is Exhibit 3 to  
21       my Declaration. Some of the information in  
22       Exhibit 3 comes in part from Deposition Exhibit 4.

23          Q       Okay. And I believe that your -- your  
24       previous testimony was that you relied on the DOE  
25       audit data, which is in part here Exhibit 4 to the



1 deposition, in order to get the numbers for capacity  
2 and energy consumption, but not the number for  
3 drying energy; is that correct?

4 A My testimony earlier today was that I  
5 definitely used the Department of Energy to  
6 determine the capacity and the tested result, but  
7 that I could not recollect without looking back  
8 through my workpapers and all of the documents  
9 whether the drying factor was something that I  
10 pulled from the test or was able to calculate. I  
11 know that the drying factor is the product of a  
12 number of pieces of information that come from the  
13 regulations that we've talked about at length today  
14 and that's something that should be able to be  
15 independently calculated.

16 Q Does Exhibit 3 to your report refresh  
17 your recollection about the number that you used for  
18 the drying factor?

19 A It refreshes my recollection about what  
20 number I used, but not the source data of that  
21 information.

22 Q And you would agree that this report  
23 does not itself identify the source of the number  
24 you used for the drying energy?

25 A Again, I would need to go back and

1 review my workpapers to make sure that this -- I'm  
2 virtually certain that the source of this number is,  
3 in fact, cited at least in Exhibit 2 to my  
4 Declaration.

5 Q Did the DOE audit calculate the drying  
6 factor for the clothes washers at issue in this  
7 case?

8 A Well, again, you've only provided me  
9 with one of the three worksheets from the DOE, so in  
10 order to refresh my recollection I need to see all  
11 three.

12 Q Sitting here you're not sure if the DOE  
13 performed those tests?

14 A Which -- I'm sorry. What tests now?

15 Q To determine the drying factor for the  
16 clothes washers at issue in this case?

17 A There is not a test to determine the  
18 drying factor. That's -- again, it's a calculation  
19 that is prescribed by the regulations.

20 Q Let's turn to Table 1. Can you walk me  
21 through step by step how you arrived at the number  
22 of 243 kilowatt hours per year?

23 A Sure. So unfortunately, I'm going to  
24 have to refer us straight back to that Exhibit 3 to  
25 my report because that's where that determination is

1 made.

2 Q That's fine.

3 A So -- boy, this printing seems to have  
4 cut some stuff off here on this copy that I have.  
5 And also in my file this document is an electronic  
6 sheet and not the paper copy here, but let me just  
7 try and visually describe it. At the top it says  
8 calculation of future energy expense, and there's a  
9 box that has inputs that can be adjusted or changed.

10 Below that is a box that has some  
11 independent test result information for electricity  
12 only. Then there is a box that has independent test  
13 results for electricity and gas. And then below  
14 that is a box that has the determination of the  
15 Energy Star minimum, MEF calculated at 212 at the  
16 bottom, and above that is the tested MEF, which  
17 takes the tested MEF of 1.72, the tested capacity,  
18 and what happens in the next cell where it says KWH,  
19 or kilowatt hour per cycle, if my memory is correct,  
20 the formula would be -- I think it's the capacity  
21 divided by -- the MEF would be the total energy  
22 used. Is that right?

23 I can't remember off the top of my head  
24 whether it's capacity divided by MEF or vice versa.  
25 But the division of those two things leaves you with

1 the total energy used by the washing machine, and  
2 you subtract from that result the drying use factor,  
3 which is shown up in the top box with the inputs.  
4 And that leaves you with a net of .62 KWH per cycle  
5 as being the electrical cost of running the machine  
6 if you are running the machine with both  
7 electrically powered spin cycle and electrically  
8 powered hot water.

9 If you multiply .62 times the  
10 prescribed 392 cycles per year, you get -- this  
11 number may be rounded here, but 243, which is the  
12 number of kilowatt hours of usage per year based  
13 upon the DOE tests.

14 Q This methodology that you have just  
15 described in your previous answer, is that the same  
16 methodology that the DOE uses in order to determine  
17 its estimated annual energy use for the energy guide  
18 label?

19 A What I have just told you includes a  
20 mathematical relationship where the MEF, the  
21 capacity, the drying use factor and the energy used  
22 expressly by the washing machine are all  
23 interrelated, and so I have used that same  
24 mathematical identity that I believe DOE uses to  
25 calculate an MEF, but, for example, the DOE is

1 determining that energy use factor in isolation by  
2 measuring the amount of hot water and the amount of  
3 electricity going to the machine. I am basically  
4 calculating that number back out using the  
5 mathematical identity from the MEF.

6 So, again, I would say they're related  
7 and we're using the same mathematical identity, but  
8 the DOE is actually conducting the energy test, and  
9 I'm simply using math to figure out the results of  
10 the DOE's energy test based upon the MEF.

11 Q So this .62 kilowatt hours per cycle,  
12 did -- is that a number that was determined by the  
13 DOE for these clothes washers in their -- in their  
14 audit tests?

15 A Yes.

16 Q If the DOE, in fact, did not determine  
17 that the kilowatt hours per cycle was .62, as you  
18 said, we would need to adjust these numbers?

19 A I haven't seen any evidence that that's  
20 the case, but again, as I've said numerous times  
21 today, my methodology is quite flexible. All of  
22 these numbers are mathematical identities and  
23 formulaic so it would be quite simple to, for  
24 example, put in results of a different test and  
25 obtain -- obtain an output.

1           Q       And the point -- I think we already  
2       went over this, the tested capacity -- yeah, never  
3       mind.

4                   Electric rates vary across states,  
5       correct?

6           A       They do, yes.

7           Q       And they vary within states?

8           A       Not when you're doing an aggregate  
9       analysis across the state.

10          Q       Are you aware that some governments  
11       offer discounts or rebates for energy costs for low  
12       income households?

13          A       Define what you mean by "government."

14          Q       State governments.

15          A       I don't have -- I don't know one way or  
16       the other.

17          Q       Safe to say you don't take any such  
18       programs into account in your projection of electric  
19       rates?

20          A       Incorrect.

21          Q       Why is that incorrect?

22          A       Because I have blended average prices  
23       per kilowatt hour across the state that's going to  
24       encompass the rates that all people pay for  
25       electricity within the state.

1           Q       And what's the source for that  
2       information?

3           A       The U.S. Energy Information  
4       Administration.

5           Q       And does the U.S. EIA take into account  
6       State Government programs to assist people with  
7       energy costs?

8           A       I believe they take into account the  
9       rates that people are actually paying regardless of  
10      what program they're using when they determine their  
11      statewide average.

12          Q       Now, you project energy costs into the  
13      future in this report; is that correct?

14          A       Correct.

15          Q       And what was your methodology for doing  
16      so?

17          A       I calculated a compound annual growth  
18      rate over 11 years of historical electricity prices,  
19      and then for the remaining years in the analysis I  
20      used the actual data points where there's an actual  
21      available and the estimate when there is not.

22          Q       Does the U.S. EIA project electric  
23      rates into the future?

24          A       I recollect us having a conversation  
25      about this two years ago, and I have not revisited

1 the issue since then, but what I remember saying at  
2 the time is that I am aware that they do conduct  
3 forecasts of electricity rates, but when I  
4 researched whether or not I felt that their rates  
5 were reasonable for use in this purpose, I made a  
6 determination that they were not. And so I have  
7 relied on my forecast of the rates here.

8 However, I would say that as with most  
9 of the components of this methodology that I have  
10 set forth, that any measure of electrical rates --  
11 past, present or future -- may be used in the  
12 analysis and the methodology will produce a result.

13 Q But as you sit here today, you standby  
14 the methodology used in Exhibit 3 to your report?

15 A Yes, I believe this is one reasonable  
16 way to estimate the damages.

17 Q Is it generally considered -- well, let  
18 me take a step back.

19 If we had to sum up your projection for  
20 electric rates into the future, you see a growth  
21 rate here in -- in the columns in the top right of  
22 Exhibit 3 in your report of 3.54 percent and  
23 4.517 percent.

24 Do you see that?

25 A I'm sorry. Would you read the question



1 back, please?

2 Q Sure. Look at the top row of the  
3 electric projections on Exhibit 3 of your report and  
4 you will see one number. It says growth rate  
5 3.54 percent.

6 Do you see that?

7 A The problem I'm having is with your  
8 characterization of all of those numbers there at  
9 the top.

10 Q You see the number 3.540 percent?

11 A I do.

12 Q What does that percentage refer to?

13 A That refers to the 11-year compound  
14 annual growth rate of electricity prices on a  
15 nation-wide basis.

16 Q And in the column next to that number,  
17 you see 4.517 percent growth rate?

18 A Yes.

19 Q What does that number refer to?

20 A That represents the compound annual  
21 growth rate of water prices across the total U.S.

22 Q Is it fair to say that you have assumed  
23 that past growth rates in the price for electricity  
24 will continue on into the future?

25 A I don't know if I would describe it as

1 an assumption. That is the method that I have used  
2 to forecast the rates based upon my experience,  
3 based upon my review of the data, based upon a  
4 number of factors. I believe that is one  
5 statistically reasonable technique to make that  
6 forecast.

7 Q Is it generally accepted in economics  
8 that past price increases will predict future price  
9 increases?

10 A It depends on what you're talking  
11 about.

12 Q How about electricity prices?

13 A That seems very reasonable to me.

14 Q Have you seen any evidence indicating  
15 that that is, in fact, the case, that past electric  
16 price growth will predict future electric price  
17 growth?

18 A I've studied this issue on a number of  
19 occasion and find that electric prices, which are a  
20 regulated utility, tend to increase -- it's not --  
21 every year is not always linear, but on average in  
22 the aggregate tend to have very reasonable,  
23 consistent growth rates.

24 Q Did you examine the energy futures  
25 market in order to determine if your method was

1 correct here?

2 A I don't believe you can make a  
3 determination on the energy futures market as to  
4 whether this methodology is correct, so I did not do  
5 so.

6 Q Did you consult with any treatises,  
7 books, articles or other experts in order to  
8 determine if this method of projecting electric  
9 growth rates in the future was appropriate?

10 A I would say yes, at least referentially  
11 in this case. This is not the first time that I've  
12 used this technique so I'm relying in part on my  
13 expertise and professional background, which has  
14 included numerous studies of this particular issue,  
15 including looking at treatises, various data sources  
16 and a number of other factors in determining that  
17 this is one reasonable technique to forecast  
18 electricity price.

19 Q Can you recall any of those sources at  
20 this time?

21 A That work would have been done five to  
22 ten years ago, so I apologize, but I don't have a  
23 recollection one way or another right now.

24 Q Have you read any articles on the  
25 projection of electric rates in the past three years

1 that you recall sitting here today?

2 A I don't have a recollection one way or  
3 the other.

4 Q And as -- as we discussed there is --  
5 and essentially the same methodology, but with a  
6 different data set for the water rates where you are  
7 relying on past rate increases and predicting future  
8 rate increases; is that fair?

9 A I don't know whether it's fair or not.

10 Q Is that what you did?

11 A Yes.

12 Q Okay. In looking at Table 1, we see  
13 the mathematical method I believe known as  
14 subtraction; is that -- is that true?

15 A Yes, there's subtraction -- some  
16 subtraction in operation here. 243 minus 212 KWH  
17 gets you a delta of 31 KWH.

18 Q On the -- on the water row, how did you  
19 arrive at the figure of 9,748 gallons?

20 A Let's turn right back to Exhibit 3 that  
21 we've been talking about here for a moment. So  
22 let's pick up where we left off in the middle of the  
23 sheet where we have the 243 and the 212 KWH numbers.  
24 If we go down there, we have average gallon of water  
25 per -- well, I can't remember if that's hectoliters

1 or what that unit is, but we had some input tables  
2 there and then we get down to independent test  
3 results, and then below that we have tested water  
4 factor and E-STAR max water factor. And in the  
5 tested water factor, I take the 8.1 water factor  
6 from the Department of Energy tests and the tested  
7 capacity and the formula, for the number of gallons  
8 is water factor times capacity equals gallons per  
9 cycle.

10 So 8.1 times 3.07 gets you roughly  
11 24.87 gallons per cycle shown in the table. And  
12 then 24.87 times 392 cycles gets you 9,748 gallons,  
13 plus or minus. Again, these numbers may be rounded  
14 in the workbook.

15 Q Okay. All right. Let's turn to  
16 Table 2. And I believe in this table we have the  
17 mathematical tool of multiplication. Is that  
18 correct?

19 A Well, again, we have some numbers that  
20 are derived in different ways, but this table does  
21 show the math of multiplying number of units times  
22 the delta in energy difference times what I've  
23 described as cumulative energy expense damage over  
24 the lifespan of the product to arrive at the total  
25 energy expense damages.

1           Q       So if I multiply 430,108 times \$42.30  
2 I'll arrive at a little over 18 million?

3           A       I don't remember if you also need to  
4 multiply -- let me -- let me see if I can look at  
5 the table here to let you know about that.

6                   Yes, I think the 42.30 is the result of  
7 31 KWH per year times the average price of KWH  
8 electricity times 11 years, which is done in the  
9 workbook shown as Exhibit 3. And so 430,000 roughly  
10 times 42.30 should get you to the \$18 million  
11 number.

12           Q       Okay. I pulled up a calculator here on  
13 my computer. I have verified that this is the case.

14                   Moving down to the water calculation,  
15 is it your testimony that approximately 430,000  
16 times \$12.70 would equal \$19 million?

17           A       No. I think here you would also need  
18 to multiply by the -- the gallon information.  
19 Either that or the 12.70 is a typo in the -- in the  
20 table. Again, I would refer you to the workpaper in  
21 Exhibit 3 to get the calculation precisely.

22           Q       What I'm trying to determine if the  
23 calculations in Table 2 are accurate or not. And it  
24 sounds like you are -- you have some hesitancy here.

25           A       I would want to double-check my work to

1 be certain, but I believe the \$19.6 million number  
2 is the correct number.

3 Q When I multiply 430,108 times \$12.70, I  
4 get about five and a half million dollars.

5 A Right. And I'm telling you that either  
6 the 12.70 is a typo in this table or an additional  
7 step needs to be taken to arrive at the \$19 million  
8 for the water, but I would refer you to the  
9 workpapers which show the demonstration of the  
10 \$19.6 million calculation, which is why I have  
11 relative comfort in that number.

12 Q Well, we have about a \$14 million  
13 difference here. So I need to know your opinion.  
14 Are you standing by the 19 million or should we  
15 adjust that to about five and a half million?

16 And please take all the time you need  
17 and refer to your workbook in order to determine  
18 what is wrong with this table.

19 A Without my electronic copy so that I  
20 can look at this, I'm not sure that I can tell you.

21 Q You would at least concede that 430,000  
22 times \$12 is not 19 million?

23 A I'm not saying anything about the  
24 damages in this case, but I think I would agree with  
25 you on -- on that one.

1           Q       So in order -- you concede there's  
2 something wrong with this table? Can we agree on  
3 that?

4           A       Right. I suspect that there's a  
5 typographical error in the table.

6           Q       Okay. Let's turn to Table 3 and tell  
7 me what are the calculations that you performed in  
8 order to arrive at the total energy expense damages  
9 in the right-hand column of Table 3?

10          A       Again, I would refer you to Exhibit 3  
11 where these calculations are made. In this case I  
12 have subdivided the electricity, or the non-water  
13 energy component of operating the washing machines  
14 into electricity used to -- to run the spin cycle of  
15 the washing machine and perform other functions, and  
16 therms of natural gas used to power -- therm,  
17 T-H-E-R-M -- the therms of natural gas necessary to  
18 operate a hot water heater to generate hot water for  
19 the washing machine.

20                   And, again, I would point you in  
21 Exhibit 3. If we start at the top, again we have  
22 the inputs, and then independent of an independent  
23 test with history, and then independent test results  
24 of electricity and gas, which, again, are shown here  
25 in that section in order to --



1 Q Now, you are looking at Table 4, it  
2 looks like. I want to talk about at Table 3.

3 A Yeah, I had just flipped back to  
4 Table 4 accidentally, but Table 3 is what I am  
5 talking about.

6 Q Okay.

7 A And what I've given you in Exhibit 3 is  
8 the reference to where that calculation is made.

9 Q When I look at Table 3, at the row for  
10 electricity, which us the first row here, when I  
11 multiply the 430,108 times 22.09, I arrived at  
12 approximately \$9.5 million.

13 A Okay.

14 Q When I go to the next row for therms  
15 and I multiply 430,180 times \$5.96, I arrive at  
16 approximately \$2.5 million. Does that sound right?

17 A I'll take your word for it.

18 Q And when I multiply 430,108 times, in  
19 the water row, \$12.70, I get approximately five and  
20 a half million dollars?

21 A Well, that line in the table is the  
22 same as in Table 2. So the discussion I've had  
23 there is going to be equally applicable here to  
24 Table 3.

25 Q So you believe that the water row in

1 Table 3 is -- is not an accurate representation of  
2 your calculations?

3 A I think it contains a typographical  
4 error. I would, again, instruct the reader of the  
5 transcript to look at Exhibit 3 to my Declaration  
6 where I set forth the calculations in -- in detail.

7 Q And to know that the true number for  
8 the water line here, you would need to refer to your  
9 electronic workbook back at your office?

10 A That would be the best way for me to  
11 give you the most accurate testimony.

12 Q Let's turn to Table 4. And take me  
13 through your calculations in Table 4.

14 A This should be very similar to Table 3  
15 and Table 2. In fact, it's a blend of Table 3 and  
16 Table 2 where I calculate blended energy expense  
17 damages for the washing machines by disaggregating a  
18 percentage of the units to running on electricity  
19 only, and then a percentage of the units as running  
20 on a blend of electricity and natural gas to conform  
21 to the actual energy consumption for hot water  
22 heaters data that I have for the United States. And  
23 which is also representative of the named Plaintiffs  
24 in the class.

25 Q And in this water row, we see the same

1 calculation as in Tables 2 and 3, which we -- I  
2 think we have now concluded is a typographical  
3 error?

4 A Yes.

5 Q Are there -- are you aware of any other  
6 errors in Table 4?

7 A Not as I sit here today.

8 Q Why don't we run through the  
9 calculation on the first row. Am I to understand  
10 that 41.3 percent of 430,108 is 177,819?

11 A That's correct.

12 Q And if I multiply 177,819 times \$22.09,  
13 I would get approximately seven and a half million  
14 dollars?

15 A I -- I believe that's correct. But you  
16 have the calculator, so you can double-check from  
17 that.

18 Q All right. Well, why don't I calculate  
19 177,819 times \$22.09, and the answer is  
20 \$3,928,021.71, which you would probably agree is  
21 different than \$7,522,445.

22 A I agree those numbers are different,  
23 yes.

24 Q Do you have an explanation as to why  
25 I've seen this number, seven and a half million

1 dollars, in the first row? If you need a  
2 calculator, I can lend you my phone. I don't know.

3 A I'm just trying to remember.

4 Again, I think I have a typographical  
5 error where on this first row, the 22.09 should be  
6 what it is in the first row of Table 2. So if you  
7 wanted to do 177,819 times 42.30, I believe that  
8 would be the correct calculation for that row.

9 Q In the process of reviewing your report  
10 today, have you identified any additional errors?

11 A Nothing other than what I would  
12 describe as these typographical errors in the third  
13 column that we've talked about today.

14 (Off-record discussion.)

15 BY MR. LOGAN:

16 Q I want to go back to the water rates  
17 just for a minute.

18 Could you look at paragraph 17 of your  
19 report. And -- and based on paragraph 17, I'd like  
20 you to tell me what data you are using to determine  
21 the price of water and what years you looked at in  
22 order to make your determination.

23 A I would refer you to Exhibit 2 of my  
24 Declaration where I say the American Water Works  
25 Association water rates surveys from 2008, 2010,

1 2013 and 2014, which serve as the basis for actual  
2 numbers where -- where we have them and forecasted  
3 numbers where we don't.

4 Q On page 2 of Exhibit 3 to your report,  
5 why don't you flip there. I -- I'd like to draw  
6 your attention to what appears to be the price of  
7 water by region from 2003 onward.

8 Do you see that?

9 A Yes, I do see that.

10 Q And yet taking paragraph 17 and  
11 Exhibit 2 into consideration, I'm seeing water rate  
12 surveys for four years -- 2008, '10, '13 and '14 --  
13 and yet this chart has data going back to 2003. So  
14 my question is, where did this data going back to  
15 2003 come from?

16 A All of the data that we have on the  
17 water pricing, at least to date, comes from the four  
18 water surveys that we've already discussed. What I  
19 don't recollect as I sit here right now because it's  
20 been quite some time since I've looked at -- through  
21 those voluminous surveys is whether or not each of  
22 those surveys provides additional data from  
23 historical time periods that would allow us to have  
24 that data, or whether we used the forecasting  
25 technique to fill in the blanks. But I would tell

1 you that we're not using data from 2003 expressly as  
2 part of the damages model. We're only looking at  
3 the price points from 2009 and onward for purposes  
4 of determining energy expense damage in this case to  
5 conform with the proposed class period.

6 Q The growth rate of 4.52 percent is  
7 present here on page 2 of Exhibit 3.

8 Do you see that?

9 A Yes.

10 Q And -- and my question is, the data  
11 going back to 2003, is that an assumption or a  
12 projection or is that real data from the American  
13 Water Works Association?

14 A And as I sit here right now I just  
15 don't recall one way or the other. It is either  
16 directly from the American Water Works Association  
17 or derived therefrom. It is not from an additional  
18 source or a guess.

19 Q Let's turn back to page 1 of Exhibit 3.

20 A Okay.

21 Q And I want you to look at the left-hand  
22 side of the page. There is a box. In the top left  
23 side of that box it says "average gallons of water  
24 per HH," which I assume is household per year.

25 Do you see that?

1 A Yes.

2 Q And I see a figure of \$96,000?

3 A Yes.

4 Q Where did that number come from?

5 A That is also derived from the American  
6 Water Works Association.

7 Q And why is it here? What -- what does  
8 that 96,000-gallon number, how does that play into  
9 your figures?

10 A Again, without the electronic  
11 spreadsheet in front of me I want to be cautious,  
12 but I believe that the Water Works data is presented  
13 on -- or in some cases presents on a per household  
14 basis on what an expenditure would be. And so in  
15 order to derive the price per gallon, you would take  
16 the average household number of gallons and the  
17 average expenditure per households to get the  
18 average price per gallon.

19 Q So it sounds like you don't remember,  
20 but you might have, in developing your opinions, you  
21 might have taken -- done a calculation not  
22 represented here where you took the total average  
23 gallons of water per household and divided it by the  
24 total expenditure on water per household?

25 A That calculation is actually shown on

1 this worksheet, at least I believe it is. And  
2 that's on the right-hand side where you see, in the  
3 middle of the growth rate section there -- are you  
4 following me? We see 446, 481, 489, 501, 525.  
5 Those amounts all correspond with page 2 for the  
6 average expenditures of water. And then I believe  
7 that amount is divided by the 96,000 gallons per  
8 household to get the rate per gallon, which is  
9 what's shown just at the left of those three-digit  
10 hundred dollar figures.

11 Q So if we go back to paragraph 17 of  
12 your report where you say, "I have examined current  
13 and historic consumer water prices on a gallon basis  
14 from the American Water Works Association water rate  
15 survey," should I construe that statement as to be  
16 you calculated price per gallon or that the survey  
17 contained its own calculation of price per gallon?

18 A I think you can certainly infer that  
19 I've done a calculation on a price per gallon.  
20 Again, it's been quite some time since I've looked  
21 at the water rate survey data. If you have it we  
22 should probably look at it to get the best possible  
23 testimony here.

24 But again, these are mathematical  
25 identities. So I think it would be inappropriate to



1 say that there isn't information about the price per  
2 gallon of water contained in the water rate surveys  
3 because it's only basic math in order to make that  
4 determination.

5 VIDEO OPERATOR: Four minutes.

6 BY MR. LOGAN:

7 Q But sitting here today, you're not sure  
8 if the American Water Works Association survey that  
9 you looked at contained price per gallon or  
10 contained the numbers that you used to calculate  
11 price per gallon? You're not sure?

12 A What I'm telling you is that these are  
13 mathematical identities, and so that information is  
14 presented in one form or another in the American  
15 Water Works surveys.

16 Q Does the American Water Works survey  
17 differentiate between a base or a fixed charge as  
18 opposed to a variable charge for water?

19 A My recollection is that it does.

20 Q How did the difference between a base  
21 charge and a variable charge play into your  
22 calculation of damages here?

23 A Without looking at that workpaper I  
24 don't have a memory one way or another, but it's  
25 definitely something that was considered as I

1 performed the analysis.

2 MR. LOGAN: Why don't we take a break  
3 here.

4 VIDEO OPERATOR: The time is now  
5 approximately 2:28. At this point we're going  
6 to end Videotape Number 2 in today's  
7 deposition of Mr. Colin B. Weir on Friday,  
8 April 22, 2016.

9 We're off the record.

10 (Brief recess.)

11 VIDEO OPERATOR: We are back on the  
12 record. The time is approximately 2:45. This  
13 will begin Videotape Number 3 in the today's  
14 deposition of Mr. Colin B. Weir on Friday,  
15 April 22, 2016.

16 BY MR. LOGAN:

17 Q All right, Mr. Weir. Why don't you  
18 turn to the section of your report that starts on  
19 page eight entitled Price Premium Damages. I think  
20 from now until the end of the deposition we'll focus  
21 on the price premium damages.

22 Can you -- I believe we discussed this  
23 briefly earlier, but can you generally summarize  
24 what it was you were trying to accomplish with this  
25 section of your report?

1           A           I was trying to measure the price  
2           premium that the class has actually paid as a result  
3           of Defendants' conduct of marking its washing  
4           machines as being y Star certified when, in fact,  
5           they were.

6           Q           Now, you emphasized this word  
7           "actually," that the class "actually paid." What  
8           did you mean by the word "actually" in your answer?

9           A           I mean it's the money that in the  
10          aggregate the class has actually paid as a result of  
11          Defendants' conduct.

12          Q           Actually paid as opposed to  
13          theoretically paid or would have paid? What are --  
14          what are you comparing that to?

15          A           I don't think I'm comparing it to  
16          anything.

17          Q           So this price premium damages section  
18          was trying to determine the amount of money that the  
19          market charged and the class members paid that was  
20          attributable to the Energy Star logo?

21          A           I think that's correct.

22          Q           Okay. Why don't we start with -- well,  
23          take a higher-level view. There's three different  
24          inputs here for the price premium percentage.  
25          There's a Whirlpool number, 55.7 percent; a Dennis

1 number, 48.5 percent; and a Sukumar number,  
2 44.3 percent.

3 Do you see that?

4 A Well, you described them as inputs, and  
5 I guess depending upon how you use that word that  
6 may or may not be an accurate description. I think  
7 the way I would describe it is that I provide three  
8 alternative measures of the price premium that may  
9 be then inputted into my price premium calculation.

10 Q And if we look at the table on page 16  
11 of your report we see here that the math is quite  
12 simple. It's whatever the price premium is, as a  
13 percentage, multiplied by the total sales resulting  
14 in a damages figure.

15 Do you see that?

16 A Yes.

17 Q And so if you saw evidence that the  
18 price premium was 20 percent you could quite easily  
19 plug that in here, multiply it times the total  
20 sales, and you would result in the damages number?

21 A I haven't seen evidence that the price  
22 premium is 20 percent, but any measure -- I would  
23 say any reliable measure of the price premium can be  
24 plugged into this formula and you can get a reliable  
25 measure of the price premium damages.

1           Q           And if the number of total sales  
2           changed because, for example, you were only focusing  
3           on one state or a subset of states, you could again  
4           easily do that calculation?

5           A           Right. Again, Table 4 right here is  
6           illustrative of the technique and at the time I had  
7           been advised that there may be a nationwide class,  
8           so it was simple to use the nationwide number. But  
9           if the Court approves seven states, we could do  
10          seven states in the aggregate or separately. We  
11          could do one state.

12                    Again, the methodology remains the  
13          same. You just want the measure of the price  
14          premium, the applicable measure of the total sales  
15          for whatever jurisdiction you're analyzing and then  
16          the basic multiplication brings you to damages.

17          Q           There is no reason to think that the  
18          price premium changed or would be -- would be  
19          different depending on the state? This is a  
20          nationwide price premium; is that correct?

21          A           What I -- what I cared about was  
22          Dr. Dennis and Dr. Sukumar confirming that they  
23          believed that this would be projectable to the  
24          class. And so I believe in their reports they  
25          identified that they believe that this is a

1 legitimate measure that could be applied to the  
2 class. And, again, it's my understanding of  
3 Dr. Dennis and Dr. Sukumar's testimony that these  
4 numbers are reasonable estimates for use nationwide  
5 or for a seven-state class or for -- or for a  
6 subgroup thereof.

7 That's all I have to say on that.

8 Q Why don't we start with this first  
9 section of your report, the Whirlpool number. You  
10 quote a document, and that document has been labeled  
11 as Exhibit 5. And the court reporter will hand it  
12 to you.

13 (Document WDDZ0000208 - WDDZ0000215,  
14 was marked as Weir-5 for identification.)

15 BY MR. LOGAN:

16 Q Exhibit 5 is Bates-labeled WDDZ0000208  
17 to -215, I believe.

18 And you see you quote at length what I  
19 believe is the first page of Exhibit 5, and you  
20 also, in paragraph 26 of your report, copy what  
21 looks like a slide, which is on page 2 of Exhibit 5.

22 Do you see that?

23 A Yes.

24 Q Where does this 55.7 percent number  
25 come from?

1           A           I believe that is the delta as between  
2   Energy Star and non-Energy Star washers expressed as  
3   a discount from the Energy Star -- did I say  
4   dishwashers? I meant to say clothes washers.  
5   They're side-by-side here.

6                   Let me start that again. My apologies.

7           I believe it is the delta between  
8   Energy Star and non-Energy Star clothes washers as a  
9   percentage of the Energy Star clothes washers as  
10  shown in the slide that I have reproduced in my  
11  Declaration. That's to the best of my recollection  
12  as I sit here right now.

13          Q          Does the information on page 1 of  
14  Exhibit 5 inform your calculation of 55.7 percent,  
15  to the best of your recollection? Or is it solely  
16  based on page 2?

17          A          To the best of my recollection, again  
18  without going back to my original workpapers, I  
19  believe it's the information on page 2. Although my  
20  opinion about the likely presence of a price premium  
21  is certainly informed by page 1.

22          Q          Might the price premium attributable to  
23  Energy Star change over time?

24          A          My apologies. My microphone keeps  
25  getting tangled up down here.

1                   My understanding of the measurement of  
2                   the price premium that I have used in this case or  
3                   measurements thereof is that they are reasonably  
4                   applied over the relevant time period in this  
5                   litigation.

6                   Q           Which is 2009 to 2010 or thereabouts?

7                   A           I believe the majority of sales took  
8                   place in 2009 and 2010. Again, my understanding is  
9                   that Dr. Sukumar and Dennis felt comfortable that  
10                  their research would apply both to the bulk of those  
11                  sales in '09 and 2010, but also to the limited sales  
12                  that took place in 2011 and onward.

13                  Q           But depending upon when a researcher  
14                  was analyzing the market, they might find it, at  
15                  least as conceivable that they would find a price  
16                  premium that changes over time for Energy Star?

17                  A           Again, that's not my understanding of  
18                  what Dr. Dennis and Dr. Sukumar have done. I  
19                  believe that they've -- at least they've testified  
20                  that they've calculated a premium that is reasonable  
21                  projectable to the class at issue in this case,  
22                  namely estimating the price premium paid by this  
23                  class over the relevant time period.

24                  Q           Now, we will get to Dennis and Sukumar  
25                  later.



1                   For Exhibit, 5 which informs your  
2                   Whirlpool number of 55.7 percent, do you know who  
3                   drafted Exhibit 5?

4                   A           I believe this document was attached  
5                   perhaps to an e-mail, so I may have known at one  
6                   point, but as I sit here today, I don't have a  
7                   recollection. But my memory is that this is a  
8                   document that was prepared internally at Whirlpool  
9                   for Whirlpool.

10                  Q           Sitting here today you don't know who  
11                  drafted this document? That's your testimony?

12                  A           Again, I believe that the documentary  
13                  evidence speaks for itself, but I don't have a  
14                  recollection of all of the voluminous documents that  
15                  I've looked at in this case.

16                  Q           These numbers on page 1 of Exhibit 5,  
17                  what is the source of these numbers?

18                  A           These numbers come from a Whirlpool  
19                  Government relations analysis of  
20                  Energy Star-qualified products.

21                  Q           And when was that analysis undertaken?

22                  A           I believe in the 2009 to 2010 time  
23                  frame.

24                  Q           And why would it be important that the  
25                  analysis take place in the 2009 to 2010 time frame?

1           A           I didn't say that it was important.  
2           You asked when it was.

3           Q           Is that significant to you that it took  
4           place in the 2009 to 2010 time frame?

5           A           That seems to fall squarely within the  
6           time period that we're analyzing here, but again, I  
7           don't have -- I don't place particular import on the  
8           exact date that the study is performed.

9           Q           Now, why don't we look at Bullet 3 in  
10          the first paragraph on page 1 of Exhibit 5 which has  
11          to do with clothes washers, and it says that  
12          "clothes washers -- Energy Star clothes washers have  
13          an average sale price that is 66 percent higher than  
14          non-qualified models."

15                   Do you see that?

16          A           I do see that.

17          Q           Do you know where this 66 percent  
18          number came from?

19          A           Whirlpool's Government relations  
20          department.

21          Q           Do we know -- I'm sorry.

22                   Do -- do you know if this number is  
23          accurate, 66 percent?

24          A           Again, I believe I made an independent  
25          calculation based upon the Whirlpool data that's

1 contained in this document that is slightly lower,  
2 which is why I relied upon my calculation rather  
3 than on the number on page 1.

4 Q Let's look, then, page 2 and where you  
5 did your calculation. Referring to the graph on the  
6 lower part of page 2, we see a bar for Energy Star  
7 clothes washers versus non-Energy Star clothes  
8 washers and we see \$702 for Energy Star and 311 for  
9 non-Energy Star. Is -- is that how you read this?

10 A Across the category, yes.

11 Q And I -- I have not done the math, but  
12 I believe that your testimony is that there is a  
13 somewhat 57.7 percent difference between the 311 and  
14 the 702? To clarify that, you would need a  
15 reduction of 57 --

16 A I think it's 55.7.

17 Q 55 --

18 A I don't know if you meant to --

19 Q My apologies.

20 A I just wanted to make sure the numbers  
21 are right. I believe it is a 55.7 reduction from  
22 the average Energy Star price to the average  
23 non-Energy Star price.

24 Q Now, these numbers, are they comparing  
25 comparable clothes washers in the sense that you

1 could attribute the price difference to Energy Star  
2 and not to other factors?

3 A That's how I read this graph here  
4 because they're showing only the delta appreciable  
5 to the Energy Star.

6 Q Are you familiar with front-loading  
7 clothes washers?

8 A Yes.

9 Q Are you aware of whether or not  
10 front-loading clothes washers sell for a higher  
11 price generally than top-loading clothes washers?

12 A I think it depends on which washers  
13 you're comparing.

14 Q Have you examined that information?

15 A At some point in time I've looked at  
16 that, but I don't have that in mind right now.

17 Q Did you do any inquiry to determine  
18 whether or not this 702 figure that we see in -- on  
19 page 2 of Exhibit 5, does that include only  
20 top-loading clothes washers or does it also include  
21 front-loading clothes washers?

22 A It may very well contain both.

23 Q Do you know where the 702 figure came  
24 from?

25 A I believe it's internal Whirlpool data.

1 Q Do you know if that data was reliable?

2 A It was reliable enough that the  
3 Government relations department decided to put it  
4 together in a memo to circulate within the company  
5 and base their business decisions upon it, yes.

6 Q Do you have any indication that  
7 business decisions were based upon Exhibit 5?

8 A I have reason to believe, based upon  
9 the text of this document that it was prepared such  
10 that it would be available for use in making  
11 business decisions. Whether anyone actually used it  
12 or not, I don't know.

13 Q Do you know if the author of this  
14 document is still employed at Whirlpool?

15 A As I sit here today, I don't have a  
16 memory one way or the other.

17 Q Would it matter to you in determining  
18 whether or not to rely on this data if the author of  
19 this document had been fired after coming up with  
20 it?

21 A I'm sorry.

22 MR. DECKANT: Objection.

23 THE WITNESS: Can I hear the  
24 objection -- question back, please?

25

1 BY MR. LOGAN:

2 Q Yes. Would -- would it matter to you  
3 in whether or not you would want to rely on this  
4 data if the author of this document was fired soon  
5 after drafting it?

6 A I would need more information to make a  
7 decision about that.

8 Q The fact that this data is allegedly  
9 internal at Whirlpool, where are you basing that --  
10 that -- that assumption on?

11 A Again, I think -- you've provided this  
12 to me a little bit out of context because I believe  
13 it's attached to e-mail correspondence that provides  
14 greater detail about the providence and use of the  
15 document. But I think you can just read this and  
16 understand that it's a Whirlpool Government  
17 relations analysis of -- so it's coming from  
18 Whirlpool. They're doing this internally. I mean,  
19 it's just obvious to me from reading this document  
20 that it's an internal analysis.

21 Q I guess the question is, what  
22 indication do you have that this is a reliable  
23 internal analysis, that these numbers are correct?

24 A Again, I take it from the department  
25 that has been cited here, the Government relations

1 department, I take it from the summary sheet here  
2 which is suggesting that Whirlpool can make  
3 decisions to increase its revenues and profits and  
4 from other context of the document that that's the  
5 case.

6 Q What information would you need to know  
7 in order to determine whether or not this data is  
8 reliable?

9 A I think I had that information as I  
10 just cited to you. I also have the data from  
11 Dr. Sukumar and Dr. Dennis that have developed very  
12 similar estimates.

13 All right. Let's mark this as  
14 Exhibit 6.

15 (Whirlpool Corporation Services 2008  
16 Energy Star Sustained Excellence Award,  
17 WDW000472 - WDW000478 was marked as Weir-6 for  
18 identification.)

19 BY MR. LOGAN:

20 Q The court reporter has marked for you  
21 Exhibit 6, a document Bates-labeled WDW0000472 to  
22 -478.

23 Do you see that?

24 A Yes.

25 Q And you cite this document in

1 paragraph 27 of your report.

2 Do you see that?

3 A Yes.

4 Q And specifically you cite language on  
5 page 476 that Energy Star products sell at a higher  
6 price than non-qualifying products resulting in  
7 higher revenues.

8 Do you see that?

9 A Yes.

10 Q The date of this document on the front  
11 is March 4, 2008.

12 Do you see that?

13 A Yes.

14 Q Would that indicate to you that any  
15 data contained in this document was produced prior  
16 to March 4, 2008?

17 A It doesn't give that indication  
18 directly, no.

19 Q Well, it -- it couldn't give revenue  
20 numbers for the future, could it?

21 A That's correct.

22 Q Turn to page 476, which you quote in  
23 page -- paragraph 27. And we see a graph under the  
24 text that you quote with -- with regards to higher  
25 revenues.



1 Do you see that graph?

2 A Yes.

3 Q What is -- it does not say here where  
4 this data came from; is that right?

5 A Well, it indicates that it comes from  
6 information about Whirlpool Corporation's  
7 Energy Star-qualified products.

8 Q Do you know if this is nationwide or  
9 North America-wide or global? Do you have any  
10 information with regards to this graph?

11 A As I sit here today, I don't have a  
12 memory one way or another.

13 Q Do you know if it -- if this graph  
14 contains data from 2007, 2008 or earlier?

15 A Again, as I sit here right now, I don't  
16 have a memory one way or another.

17 Q It doesn't say it, does it, on this  
18 page?

19 A Well, this is being -- you have to  
20 understand the context of this document. They've  
21 just -- Whirlpool has just won a 2008 Energy Star  
22 Sustained Excellence Award, and it's presenting  
23 information that it believes is relevant to its  
24 current position in the marketplace as a leader with  
25 Energy Star appliances.

1                   And, again, I'm trying to remember if  
2                   there's additional context other than the Bates  
3                   pages that you cite here. Hold on. Let me just  
4                   take a quick look through here.

5                   This is done in sort of a press release  
6                   or investor standard format, so these are trying to  
7                   provide information that are going to be relevant to  
8                   people who are analyzing the Whirlpool Corporation.

9                   Q           Are these numbers accurate? Did  
10                  Whirlpool get it right?

11                  A           I haven't undertaken an independent  
12                  analysis. All I've used this document for is to  
13                  cite just one additional piece of evidence that  
14                  Energy Star products generally cost more than their  
15                  non-Energy Star counterparts, which I really just  
16                  have seen zero pieces of evidence to counter --  
17                  contradict that fact.

18                  MR. LOGAN: Let me mark that.

19                  (The value of the Energy Star market,  
20                  WDZ0000280 - WDZ00030207 was marked Weir-7 for  
21                  identification.)

22                  BY MR. LOGAN:

23                  Q           The court reporter has given you  
24                  Exhibit 7, WDZ0000204 through -207.

25                  Do you see that?

1           A           Yes.

2           Q           And you cite this document in  
3 Footnote 21 of -- of your report.

4                       Do you see that?

5           A           Yes.

6           Q           And you refer to this document as a  
7 meta-analysis; is that correct?

8           A           Yes.

9           Q           What is a meta-analysis?

10          A           A meta-analysis usually aggregates  
11 information or conclusions from multiple studies.  
12 So if you look here on Bates ending 206, you see a  
13 variety of source documents cited for the  
14 information that's presented in this document.

15          Q           And all of the source documents listed  
16 under sources on page 206 are from 2003 or earlier?

17          A           Yes, that's right.

18          Q           What information, from this document,  
19 do you think is relevant for a time period of 2009  
20 to 2010?

21          A           Well, all of these documents that I  
22 cite here need to be understood in a holistic  
23 approach and not looking at any one of these  
24 documents independently. This shows that there is,  
25 in concert with the other documents, a sustained

1 expectation that consumers will and do pay price  
2 premiums for Energy Star appliances, no matter what  
3 the time period that you're examining.

4 Q Does this document say that people are  
5 willing to pay price premiums for Energy Star  
6 appliances?

7 A That's clearly implied here in this  
8 document, yes.

9 Q Where?

10 A It shows that Energy Star purchases are  
11 increasing. 93 percent of consumers say they will  
12 look for the Energy Star product. That means that  
13 the Energy Star is a major product differentiator,  
14 which is something that is indicative of price  
15 premium. 84 percent of people agreed that it's  
16 important household appliances to have the Energy  
17 Star label.

18 I'm not done yet.

19 Q Okay.

20 A 50 to 60 percent say that the presence  
21 of the Energy Star mark influenced their purchase  
22 decision. 95 percent say they will be repeat Energy  
23 Star purchasers. 71 percent say they will recommend  
24 Energy Star to a friend.

25 Incentives aren't required. In other

1 words, they don't have to be -- consumers don't need  
2 to be incentivized to actually pay more on the  
3 product. I mean, this whole document --

4 Q To pay more for the product, were  
5 you -- is that language here?

6 A Incentives aren't required. In order  
7 for an incentive to be required, you'd have to have  
8 a reason not to buy an Energy Star product, and the  
9 only reason that I can understand, based upon the  
10 contents of this document, would be that they are  
11 more expensive. I mean, virtually every sentence in  
12 here, especially when read in the context of the  
13 whole document, and the other evidence in the case  
14 suggests that consumers are willing to and do pay  
15 price premiums for the Energy Star.

16 MR. LOGAN: Let's look at -- let's mark  
17 this.

18 (Document Wdz0000005 - Wdz0000020, was  
19 marked Weir-8 for identification.)

20 BY MR. LOGAN:

21 Q The court reporter has marked for you  
22 Exhibit 8, Bates-labeled Wdz0000005 through -20.  
23 And you cite page Bates-labeled 9 in Footnote 22 of  
24 your report.

25 Do you see that?

1           A           Yes.

2           Q           And the language that you cite is a  
3           finding that "Energy Star is the second most  
4           influential label in the marketplace."

5                       Do you see that?

6           A           Yes.

7           Q           It is -- this is in very small print,  
8           but it looks like there is a source for the  
9           information on this graph at page 9, but I -- I  
10          cannot read what it says. But do you see that where  
11          it looks like it says source?

12          A           I have a memory from seeing this in a  
13          copy that you can zoom in on that this is either  
14          Fairfield or Fairchild Research, July 2009.

15          Q           So it's safe to assume that there was  
16          some sort of study conducted that made this  
17          determination?

18          A           I believe that's correct, yes.

19          Q           Did you look at the underlying source  
20          material that Fairfield or Fairchild study?

21          A           I didn't look at that particularly, but  
22          I understand that Whirlpool, at least at the time  
23          period that this graph was created, used this in a  
24          lot of its publicity and discussions about the  
25          Energy Star.

1 MR. LOGAN: Let's mark that.

2 (Compilation of documents, WDZ0018976 -  
3 WDZ0018998, was marked Weir-9 for  
4 identification.)

5 BY MR. LOGAN:

6 Q The court reporter has marked for you  
7 Exhibit 9, a document Bates-labeled WDZ0018976  
8 through -18998.

9 Do you see that?

10 A Yes.

11 Q And you cite this document in  
12 paragraph 30, Footnote 23 of your report.

13 Do you see that?

14 A Yes.

15 Q And if we turn to the page that you  
16 cite, which is 18993, we see some familiar numbers  
17 for clothes washers.

18 Do you see that?

19 A There are numbers here relating to  
20 clothes washers?

21 Q Specifically that the Energy Star  
22 clothes washer costs \$702 versus a non-Energy Star  
23 of \$311.

24 Do you see that?

25 A Yes.

1           Q       And I believe that those are the same  
2 numbers on the graph in your report quoted in  
3 paragraph 26 of your report, 702 versus 311.

4           A       Yes, they are.

5           Q       If you turn to the front page of this  
6 exhibit you see that this was an e-mail dated  
7 September 25, 2007?

8           A       Yes.

9           Q       And we see an e-mail on that page that  
10 says, "Hi, Mike. Attached is an Energy Star  
11 presentation I gave yesterday."

12                   And it is -- this is an e-mail from  
13 Andy Sinclair.

14                   Do you see that?

15           A       Yes.

16           Q       So if Andy Sinclair gave this  
17 presentation in 2007, what does that tell you about  
18 the numbers for the Energy Star versus non-Energy  
19 Star clothes washers on page 16 of this  
20 presentation?

21           A       I don't know that it tells me anything  
22 about those numbers, in particular.

23           Q       Maybe that they predate September 2007?

24           A       That may be true.

25           Q       Maybe they're from 2003?



1 MR. DECKANT: Objection.

2 THE WITNESS: I don't think that's  
3 indicated in this document.

4 BY MR. LOGAN:

5 Q What is indicated in the document as to  
6 the date that these numbers -- that -- let me -- let  
7 me rephrase.

8 Is there anything in this document that  
9 tells you when these numbers were -- were gathered?

10 A This document doesn't provide an  
11 indication of the date of those numbers.

12 Q Do you have any personal information  
13 that would provide a date for these numbers?

14 A I don't believe I bring anything  
15 personal to this. I'm here testifying as an expert  
16 today.

17 Q Let me rephrase. Do you have any  
18 evidence that indicates when these numbers were  
19 gathered?

20 A I'd say the documents that I have  
21 reviewed speak for themselves. I started out today  
22 by informing you that I would need to look at the  
23 details of documents to give you precise information  
24 like that. So unless you are -- you have other  
25 exhibits to help refresh my recollection, as I sit

1 here right now, I don't know.

2 Q The average retail price that you  
3 calculated for the clothes washers at issue in this  
4 case was 406; is that right, approximately?

5 A On a nationwide basis, yes.

6 Q And that is a lot closer to the \$311  
7 non-Energy Star clothes washer than it is to the  
8 \$702 Energy Star clothes washer as stated in -- on  
9 page 16 of Exhibit 9?

10 A You've just grossly mischaracterized  
11 those data points.

12 Q How is that?

13 A So I don't agree.

14 Q You think that 406 is closer to 702  
15 than it is to 311? That's your opinion?

16 A That's not what you asked me.

17 Q That's exactly what I asked you.

18 THE WITNESS: Can I hear back his  
19 question, please?

20 (At which time the following question  
21 was read back by the reporter:

22 "Question: And that is a lot closer to  
23 the 311 non-Energy Star clothes washer than it  
24 is to the 702 Energy Star clothes washer as  
25 stated in -- on page 16 of Exhibit 9?"")

1                   THE WITNESS: You've characterized  
2                   these as individual prices of individual  
3                   clothes washers, and that's not what this  
4                   document indicates.

5       BY MR. LOGAN:

6           Q       This document indicates that there are  
7           several clothes washers that it is considering.

8           A       It certainly does.

9           Q       All Whirlpool clothes washers? That's  
10          your testimony?

11          A       It indicates a category of clothes  
12          washers that are Energy Star versus a category of  
13          clothes washers that are non-Energy Star.

14          Q       How many clothes washers models were  
15          included in this study?

16          A       As I sit here right now, I don't have a  
17          recollection one way or the other.

18          Q       But you've never seen data that would  
19          give you the answer to that question, have you?

20          A       I don't know that to be true.

21          Q       You don't know that to be true. So  
22          let's turn to paragraph 33 of your report --

23          A       Okay.

24          Q       -- where you say "Whirlpool had made  
25          its own calculation of the price premium

1     attributable to the Energy Star logo on its washing  
2     machines."

3                     Do you see that?

4             A         Yes.

5             Q         And what you're telling me is that the  
6     calculation that you are relying on in your  
7     report -- in your report to arrive at the price  
8     premium of 55.7 percent, you know basically nothing  
9     about how those numbers were calculated?

10                    MR. DECKANT:  Objection.

11                    THE WITNESS:  I disagree with that  
12     characterization.

13     BY MR. LOGAN:

14             Q         Tell me everything you know about how  
15     these numbers were calculated in order to get to the  
16     55.7 percent.

17                    MR. DECKANT:  Object to form.  Is there  
18     a question pending?

19                    MR. LOGAN:  That was the question.

20                    MR. DECKANT:  Could you please read  
21     that back.

22                    MR. LOGAN:  Let me -- let me rephrase.

23     BY MR. LOGAN:

24             Q         You have admitted that the 55.7 percent  
25     is based upon the difference between -- I believe it

1 was 702 and 311 and you have no idea where these  
2 numbers came from, 702 and 311, what models were  
3 considers, what features were considered, what time  
4 period was considered and what geographic scope was  
5 considered; isn't that your testimony?

6 A It is not.

7 Q Tell me what was the geographic scope  
8 of the study that concluded a 55.7 price premium  
9 excitant for Energy Star.

10 MR. DECKANT: Objection. Object to  
11 form.

12 THE WITNESS: Upon consideration of  
13 this and having seen some more of these  
14 documents, I remembered that of course the  
15 Energy Star is a U.S.-only program. So it's  
16 related to the U.S.

17 BY MR. LOGAN:

18 Q It's your testimony that there is --

19 MR. DECKANT: Did you finish your  
20 answer?

21 THE WITNESS: Yes, I'm finished.

22 MR. DECKANT: Okay.

23 BY MR. LOGAN:

24 Q So there is no reason to think that  
25 someone out of the United States, a consumer outside

1 the United States, would have knowledge of the  
2 desirability of Energy Star?

3 A That's not what I said.

4 Q It's your testimony that there is no  
5 equivalent Energy Star-type program in Canada or  
6 Europe?

7 A That is also not what I said.

8 Q You are testifying that the geographic  
9 scope of this study was the United States?

10 A Because it relates to the U.S. EPA's  
11 Energy Star program.

12 Q From what time period?

13 A Again, I've asked you to provide me the  
14 contextual documents relating to the document that I  
15 cite in my report. You haven't done so. As I sit  
16 here today, I can't provide a recollection to you.

17 Q Exhibit 9 includes an e-mail from  
18 September 25, 2007.

19 A Exhibit 9 is not the document that I  
20 cite in my Declaration as support for my conclusion  
21 that it may be appropriate to use the 55.7 percent  
22 price premium calculated internally by Whirlpool's  
23 own Government relations department.

24 Q But it is the presentation that is  
25 attached to the e-mail beginning with Exhibit 9?

1           A           No. What I cite in my Declaration as  
2           the support for the 55.7 percent is Bates  
3           WDZ0000209.

4           Q           Which is a graph that is identical to  
5           the graph that appears to page 17 of Exhibit 9 and  
6           contains the same information for Energy Star versus  
7           non-Energy Star clothes washers?

8           A           They do look to be the same, but it is  
9           not the same document that I'm looking at.

10          Q           But it's the same graph?

11          A           It appears to be the same graph.

12          Q           So do you know -- just to clarify, you  
13          do not know who conducted the study that resulted in  
14          these numbers?

15          A           I don't know precisely who it was, but  
16          it's clearly being sponsored by Whirlpool's  
17          Government relations department.

18          Q           Who is the Whirlpool Government  
19          relations department? How many people are in it?

20          A           That's well beyond the scope of my  
21          analysis here. I don't know.

22          Q           Do they have Ph.D.s in statistics?

23          A           How could I know that?

24          Q           I don't know. I'm asking you. Do you  
25          know that or not?

1           A           I don't know one way or the other.

2           Q           And we've already been over this. You  
3           don't know the time period that this study took  
4           place?

5           A           Again, as I sit here today, I don't  
6           have a precise recollection. You have, first of  
7           all, continued to mischaracterize my testimony about  
8           the time period and refused to provide the  
9           surrounding documentation that I've requested to  
10          refresh my recollection.

11          Q           I am not aware of any surrounding  
12          documentation. And I have also looked at every  
13          document that you cited in your report. I don't see  
14          any documents that would give you more information  
15          than what you have here. So I'm just representing  
16          that to you. There's no tricks up my sleeve. I'm  
17          not trying to hide information from you. I need you  
18          to admit that you have no idea where these numbers  
19          came from.

20                   MR. DECKANT: That's -- that's not a  
21          question. Object to form.

22                   Is there a question pending?

23                   MR. LOGAN: There is not a question  
24          pending.

25



1 BY MR. LOGAN:

2 Q Does this study include Maytag clothes  
3 washers?

4 A As I sit here today, I don't recollect  
5 one way or the other.

6 Q Does this study include Amana clothes  
7 washers?

8 A As I sit here today, I don't recollect  
9 one way or the other.

10 Q Does this study include KitchenAid  
11 clothes washers?

12 A As I sit here today, I don't recollect  
13 one way or the other.

14 Q The information that you do recollect  
15 about how these numbers were created is that someone  
16 in the Whirlpool Government relations team drafted  
17 this document? That's the information you have  
18 about this study; is that right?

19 A That is one of the pieces of  
20 information I have about this that I recollect here  
21 today.

22 Q What other pieces of information did  
23 you consider in order to substantiate the numbers in  
24 this analysis?

25 A That is a very broad category of

1 things. It includes the results of the Dennis and  
2 Sukumar surveys. It includes a lot of the documents  
3 that we cited here today. It includes my  
4 background, research on the price premium for Energy  
5 Star appliances. It includes my expertise in making  
6 these calculations in other litigations. It  
7 includes my research based on the Energy Star  
8 outside of litigation. Every single piece of  
9 evidence that I have seen points to price premiums  
10 of this order of magnitude for washing machines of  
11 Energy Star-certified nature versus those that are  
12 not.

13 Q If there was a price premium of  
14 55.7 percent and the average retail price for these  
15 clothes washers is \$406, what would that tell you  
16 about what this -- what the market would have priced  
17 these clothes washers at had the Energy Star logo  
18 not been there?

19 A I haven't made that analysis, but what  
20 I would tell you is that consumers have been paying  
21 a price premium of the 55.7 percent of the purchase  
22 price because of the presence of the Energy Star  
23 logo.

24 Q Meaning that an equivalent machine that  
25 did not have the Energy Star logo would have been

1     priced at 55.7 percent less than \$406, average  
2     retail price?

3             A           These in not my testimony. It's  
4     meaning that consumers would have paid a  
5     55.7 percent price premium as a result of the  
6     washing machine bearing the Energy Star logo.

7             Q           I'm -- I'm just confused as to the  
8     difference.

9                         Could you explain, what is the  
10    implication of -- for market prices of the fact that  
11    there is a 55.7 percent price premium for the Energy  
12    Star logo for the clothes washers in this case?

13            A           The implication is that if liability is  
14    established that amount is or should be economically  
15    available to the Plaintiffs in this class as damages  
16    because that would be the amount that they paid in  
17    the marketplace as a direct result of the Energy  
18    Star logo being applied by the Defendant when, in  
19    fact, it should not have been.

20            Q           So that is the -- that is the amount  
21    that the class members paid in the marketplace as a  
22    direct result of the Energy Star logo being applied  
23    to the clothes washers in this case?

24            A           Correct.

25            Q           Had that logo not been there, your

1 testimony is that the market price would have been  
2 different?

3 A I haven't testified anything about what  
4 might have happened had the logo not been there. My  
5 testimony is related to what consumers actually paid  
6 because the logo was there. And that amount is  
7 somewhere between mid-40s and mid-50s percent of the  
8 purchase price.

9 Q So you have no information about what  
10 consumers would have paid had the logo not been  
11 there?

12 A My analysis is designed to calculate  
13 the price premium that consumers actually paid as a  
14 result of the logo being there.

15 Q Does that imply that had the logo not  
16 been there they would have paid less?

17 A I have not made a consideration one way  
18 or the other.

19 Q So it's -- I'm trying to reconcile  
20 your -- your testimony here, is that consumers  
21 actually paid a price premium for the presence of  
22 the Energy Star logo, but it seems like you're also  
23 saying that they did not necessarily pay more  
24 because the logo was there?

25 A That's not my testimony.

1 Q What is your testimony?

2 A They definitely paid a price premium  
3 because the logo is.

4 Q But would not have been paid less had  
5 the logo not there?

6 A I haven't said that at all.

7 Q Do you agree with that?

8 A Agree with what? Please restate that.

9 Q That they would have paid less had the  
10 logo not been there.

11 A I haven't made an analysis of that one  
12 way or the other. What I've done is to analyze what  
13 consumers actually did pay as a result of the  
14 presence of the Energy Star logo when it should not  
15 have been there.

16 Q So I have done no analysis to compare  
17 what they did pay because the logo was there versus  
18 what they would not have paid had the logo not been  
19 there? I'm sorry. What they would have paid had  
20 the logo not been there?

21 A It's my understanding that we needed to  
22 determine the price premium that was actually paid  
23 by consumer as the result of the logo being there,  
24 and that's what I've done.

25 Q What is the price premium?

1           A           It depends on the context.

2           Q           The context of your report.

3           A           It's the price that people paid as a  
4 result of the washing machines having been labeled  
5 as Energy Star certified when, in fact, they were  
6 not.

7           Q           People paid \$406 on average for these  
8 clothes washers, correct?

9           A           On a nationwide basis, yes.

10          Q           And you were trying to determine what  
11 percentage of the 406 was due solely to the Energy  
12 Star label?

13          A           Correct.

14          Q           How were prices set in the marketplace?

15          A           Again, I need more information in order  
16 to answer that question.

17          Q           Are prices not set through the  
18 interaction of supply and demand?

19          A           They may or they may not be.

20          Q           In this case were they?

21          A           In this case we have a product that has  
22 been differentiated and carries a price premium,  
23 which means that the sellers of the product have  
24 some control over the market price, which is what  
25 allows them to charge a marketplace price premium,

1 for example, as a result of the Energy Star logo.

2 Q So you believe that the sellers have  
3 had in 2009 to 2010 market power that allow them to  
4 charge a price premium for Energy Star clothes  
5 washers; is that your testimony?

6 A All of the evidence points to that,  
7 yes.

8 Q What evidence points to that?

9 A Whirlpool's analysis that its profit  
10 margins are higher on Energy Star washing machines  
11 as opposed to not, the fact that revenue is higher.  
12 All of these same data points that we're talking  
13 about that indicate that there's a price premium.

14 Q All of that data was from before 2009;  
15 isn't that correct?

16 A I don't necessarily believe that to be  
17 true.

18 Q Can you point to any evidence as you  
19 sit here today from 2009 to 2010 that there was a  
20 price premium for the Energy Star logo in the  
21 clothes washer market in the United States?

22 MR. DECKANT: Objection.

23 THE WITNESS: Sure, the Dennis and  
24 Sukumar surveys.

25 BY MR. LOGAN:

1           Q       None of that was from 2009 and 2010;  
2       isn't that correct?

3           A       It is designed to capture information  
4       applicable to the 2009 and 2010 time period.

5           Q       If they did not accurately capture  
6       information from the 2009 to 2010 time period then  
7       their analysis would be off; is that correct?

8           A       I don't know how to answer that  
9       tautological question.

10          Q       You said that they captured information  
11       applicable to the 2009 and 2010 time period. That's  
12       your testimony?

13          A       I believe that's their testimony.

14          Q       When, in fact, it was a survey  
15       conduct -- these were surveys conducted in 2015.

16          A       You're suggesting that those things are  
17       antithetical to one another and I disagree, and I  
18       think Dr. Sukumar and Dr. Dennis would disagree as  
19       well.

20          Q       Did you do an analysis of how  
21       competitive the market for Energy Star clothes  
22       washers was in 2009 to 2010?

23          A       Other than my analysis of the Maytag  
24       profit margins and other things, I haven't studied  
25       that specifically. It's not necessary to understand



1 the price premium that's being charged in that  
2 marketplace.

3 Q Isn't it necessary to understand the  
4 competitive market for Energy Star clothes washers  
5 when you were trying to determine whether or not  
6 there was a price premium?

7 A Not when we have the actual sales  
8 figures that reflect the competitive conditions  
9 extant at that time.

10 Q How many -- how many top-loading Energy  
11 Star clothes washers models were for sale in 2009  
12 and 2010?

13 A As I sit here today, I don't have a  
14 recollection of that number.

15 Q What was the Whirlpool's profit margin  
16 on top-loading Energy Star clothes washers in 2009?

17 A As I sit here today, I don't have a  
18 recollection of that number.

19 Q Same question for 2010.

20 A Same answer.

21 Q Were any clothes washers for sale  
22 during 2009 or 2010 that were between 180 and \$220?

23 A I'm sorry. Can I hear that back,  
24 please?

25 Q Were there any clothes washers for sale

1 during 2009 or 2010 that were between 180 and \$220?

2 A That has no import to my analysis, so I  
3 haven't made a study of it one way or another.

4 Q Was there a comparable non-Energy Star  
5 top-loading clothes washer for sale in 2009 and  
6 2010? And by "comparable," I mean comparable to the  
7 clothes washers at issue in this case?

8 A Well, you've attempted to define  
9 "comparable," but I still don't understand what you  
10 mean by that term.

11 Q Was there a clothes washer that was  
12 similar in build, features, brand that was  
13 non-Energy Star on the market in 2009 and 2010?

14 A I am not aware of any evidence that  
15 there was a washing machine that is non-Energy Star  
16 qualified that is the same in all other respects  
17 in -- as the model that is at issue in this  
18 litigation.

19 Q If there was evidence of that nature,  
20 would you want to know about it?

21 A It wouldn't impact my -- it wouldn't  
22 impact my analysis in this case at all.

23 Q So if, in 2009 and 2010, there were two  
24 identical Maytag top-loading clothes washers for  
25 sale retail and one was Energy Star and one was

1 non-Energy Star, you would have no interest in  
2 learning that information in order to calculate a  
3 price premium?

4 A Is that a hypothetical, or are you  
5 asserting that that's an actual fact?

6 Q I'm asking you a hypothetical question.

7 A I would need more information about  
8 what's going on in the marketplace in those products  
9 to understand that.

10 Q Did you examine any historical data,  
11 for example, catalogues, price lists, to understand  
12 the clothes washer market in 2009 and 2010?

13 A I did examine some historical product  
14 guides and lists of products, especially from the  
15 Whirlpool company, as part of my analysis.

16 Q And what did your review of that data  
17 tell you?

18 A There was nothing in specific that I  
19 took away from it other than some precise  
20 information about the products at issue in this  
21 litigation and confirming my sense that the  
22 application of either Whirlpool or Drs. Dennis or  
23 Sukumar's price premium figure would be appropriate  
24 in this litigation.

25 Q Let's move on to Dennis, which I

1 believe was previously marked as Exhibit 2.

2 MR. LOGAN: Everyone still good?

3 BY MR. LOGAN:

4 Q You've read this document before?

5 A I have.

6 Q And can you describe the methodology  
7 that Dr. Dennis used to come up with this report?

8 A At a high level Dr. Dennis used a  
9 contingent valuation survey with an experimental  
10 design to determine the marketplace price premium  
11 that consumers actually paid as a result of  
12 defendant's conduct in this litigation.

13 Q At a high level, this survey asked its  
14 respondents to identify what they would be willing  
15 to pay for an Energy Star clothes washer; isn't that  
16 right?

17 A Absolutely incorrect.

18 Q And why is that incorrect?

19 A Well, I guess it depends on how you  
20 define "willingness to pay," but I define  
21 "willingness to pay" as the maximum amount that  
22 somebody would be willing to pay for a clothes  
23 washer and this doesn't in any way get at that  
24 particular information. This is only the price  
25 premium that consumers paid in the marketplace.

1           Q       What about this survey indicates that  
2       it is trying to find the actual marketplace price  
3       premium?

4           A       What about the survey itself, or what  
5       about the Dennis report and his testimony in this  
6       litigation?

7           Q       Let's go with -- with the Dennis  
8       report.

9           A       I believe a reading of the report will  
10      make it clear that he's looking at the price premium  
11      that consumers paid. I know he's testified  
12      similarly at his deposition.

13          Q       Your testimony is -- I'm sorry. I see  
14      this as a little bit tautological.

15                   He's looking at market prices because  
16      he's looking at the price premium that people paid  
17      in the marketplace. Why do you say that this is a  
18      reflection of actual marketplace reality?

19          A       Why do I think it is?

20          Q       Yes.

21          A       It's based on a sample that is  
22      projectable to the class. It is based upon the  
23      actual retail sales data for the products at issue  
24      in this case.

25          Q       When you say it is based on the actual

1 retail sales data for the products at issue in this  
2 case, what do you mean?

3 A I believe Dr. Dennis took information  
4 about the typical retail sales price and informed  
5 his creation of his survey questionnaire to utilize  
6 that information.

7 Q So he used a price -- you can see it on  
8 page 14 of his report, the Energy Star clothes  
9 washer as being \$400, which is approximately the  
10 average retail price of this case.

11 A That's correct.

12 Q Is there anything else that he did in  
13 order to base his survey on actual retail sales data  
14 for the products at issue in this case?

15 A First of all, I think that's a question  
16 better levied to Dr. Dennis since he's the one that  
17 conducted the survey. But I am aware that he has  
18 controlled in his survey design for people that have  
19 purchased washing machines that relate to the  
20 products at issue in this case and has implemented  
21 other survey controls to allow this to be a survey  
22 result projectable to the class and to the products  
23 at issue in this litigation, and that Dr. Dennis  
24 testifies that the price premium he calculates is,  
25 in fact, representative of the class.

1           Q       Well, let me point you to some language  
2       in your report, paragraph 45, where you say, "I  
3       understand Dr. Dennis considered and accounted for  
4       supply-side factors in the determination of his  
5       price premium calculation."

6                       Do you see that?

7           A       Yes.

8           Q       And you have a footnote, and it is to  
9       the Dennis report at 3 and 12.

10                    Do you see that?

11          A       Yes.

12          Q       What did you mean by "3 and 12," is  
13       that pages or paragraph numbers?

14          A       Pages. My reports typically say at a  
15       number when it's at a page and at para, if it's a  
16       paragraph.

17          Q       What information on page -- well, let  
18       me take a step back.

19                    What do you mean by "supply-side  
20       factors"?

21          A       A number of things that are discussed  
22       by Dr. Dennis in his Declaration.

23          Q       Such as?

24          A       Let me go through and identify them  
25       from the document for you.

1 Dr. Dennis identifies that he has read  
2 and interpreted the Complaint and has used that both  
3 to understand the market realities, the washing  
4 machines in question, as well as the study target  
5 population. He references other materials  
6 considered in his attachment, which reference the  
7 actual retail sales transactions which reflect  
8 prices that are set by the -- in part by the  
9 interaction of supply and demand.

10 He again references expressly the  
11 actual sales data and advertising circulars which  
12 reflect the available supply of both the Maytag and  
13 competitive washing machines and their price points.

14 Q Do you know what competitive washing  
15 machines he looked at?

16 MR. DECKANT: Did you finish your prior  
17 answer?

18 THE WITNESS: I did not.

19 Would you like my prior answer to be  
20 understood as incomplete, or would you like  
21 me to finish that answer?

22 BY MR. LOGAN:

23 Q Why don't you answer the most recent  
24 question first and then we'll go back and finish the  
25 other supply-side factors considered by Dr. Dennis.



1           A           I did not independently verify which  
2 competitors Dr. Dennis looked at. You would need to  
3 ask him which ones he looked at in formulating his  
4 survey. But it's clear that he did so from a read  
5 of his report, and I believe he made that indication  
6 in his deposition as well.

7           Q           Okay. You can continue with your  
8 previous answer.

9                       MR. DECKANT: Just for the clarity of  
10 the record, can we please read back what the  
11 question before that was?

12 BY MR. LOGAN:

13          Q           I'll ask it again.

14                       What were the supply-side factors  
15 considered by Dr. Dennis?

16          A           So in addition to the factors that I  
17 already mentioned, his selection of the base price  
18 point for the survey is based on the actual retail  
19 sales information about the actual supply of washing  
20 machines that were sold. That's all that I've cited  
21 here. I believe it's possible that there may be  
22 other supply-side considerations that he made in  
23 his -- in his Declaration as well, or in his work on  
24 this.

25          Q           So I want to recap the supply-side

1 factors that you can recall being considered by  
2 Dr. Dennis. And the first one you cited was that he  
3 read and interpreted the Complaint in this case, and  
4 that he used a \$400 price point, which was  
5 reflective of actual retail sales data; and number  
6 3, that he looked at advertising circulars.

7 Is that exhaustive? Are there any  
8 other supply-side factors that you see being  
9 considered by Dr. Dennis?

10 A I don't accept your summary of my prior  
11 testimony and would like my testimony about what  
12 Dr. Dennis relied upon to stand on its own.

13 Q Well, I read it here from this machine.  
14 But in any event, you cited the  
15 Complaint, you cited the \$400 price point and you  
16 cited known competitive circulars and  
17 advertisements. Are there -- is there anything  
18 else?

19 A That is an unfair summary of my  
20 testimony. I do not agree with how you've  
21 characterized my testimony and your statement that  
22 you have read the record into the record again is  
23 inaccurate. You've cherrypicked words from my prior  
24 answer in order to mischaracterize what I've said.

25 Q Okay. Well, then, let's just do it

1 again.

2 The first thing you mentioned -- well,  
3 okay. What are the supply-side factors considered  
4 by Dr. Dennis?

5 A Would you read back my answer to the  
6 original question since this is the same question?

7 Q No. No. We're not going to do that.

8 What are the supply-side factors  
9 considered by Dr. Dennis? State the first one, and  
10 then I will have a series of questions about your  
11 whatever first part of your answer is.

12 A Well, that's a multi-part question.

13 Q What's part number one?

14 A You said --

15 Q What's the first supply-side factor  
16 that you would like to talk about today considered  
17 by Dr. Dennis?

18 A I don't want to talk about any of them  
19 today.

20 Q What -- how many supply-side factors  
21 would you say Dr. Dennis considered? Do you have a  
22 number?

23 A I don't have a precise count. There's  
24 a multitude of them.

25 Q Let's -- name one.

1           A           The actual retail prices at which the  
2           washing machines were sold.

3           Q           And why is that a supply side factor?

4           A           Because it reflects to the extent that  
5           it impacted prices the interaction of supply and  
6           demand, as well as the number of units that were  
7           sold, the actual supply of those units extant in the  
8           marketplace.

9           Q           Isn't it the case that the price is --  
10          that the price is an interaction of supply and  
11          demand, but the price by itself does not tell you  
12          other information about the supply and demand curves  
13          for this product?

14                   THE WITNESS: Can I hear that back,  
15          please?

16                   (At which time the following question  
17          was read back by the reporter:

18                   "Question: Isn't it the case that the  
19          price is -- that the price is an interaction  
20          of supply and demand, but the price by itself  
21          does not tell you other information about the  
22          supply and demand curves for this product?")

23                   THE WITNESS: I believe the price  
24          itself can be informative about the supply and  
25          demand curves here. And I disagree again with

1           your characterization that the prices at issue  
2           in this litigation were the direct result of  
3           only the interaction of supply and demand.

4       BY MR. LOGAN:

5           Q           What does the \$406 price point tell you  
6           about demand -- and supply in this case?

7           A           That washing machines were sold at a  
8           \$406 price point.

9           Q           Anything else?

10          A           You need to understand the number of  
11          units that were sold.

12          Q           Anything else?

13          A           Again, I haven't made that analysis in  
14          this case, so I'm not really prepared to get into  
15          great detail about it today.

16          Q           Okay. That was the first supply-side  
17          factor considered by Dr. Dennis. Are you aware of  
18          any other supply-side factors considered by  
19          Dr. Dennis?

20          A           Yes.

21          Q           Such as?

22          A           He looked at actual sales data and  
23          actual advertising circulars, which include  
24          information about competitor products in the  
25          marketplace, as well as competitive pricing.

1           Q       All right. So your answer is he looked  
2       at actual sales data and actual advertising  
3       circulars, which include information about  
4       competitor products in the marketplace, as well as  
5       competitive pricing?

6           A       It also includes information about the  
7       pricing and sales of the actual washing machines at  
8       issue in this litigation.

9           Q       Now, we -- we have talked about the  
10      sales figures for the clothes washers at issue in --  
11      in this case, and you stated that you are not aware  
12      of which competitor products Dr. Dennis evaluated in  
13      his study; is that right?

14          A       Just that he did evaluate the presence  
15      of competitor products.

16          Q       All right. So we have now discussed  
17      two supply-side factors. Is there a third?

18          A       There is, which I think actually there  
19      is one source document, which is the Complaint, but  
20      that that includes other supply-side consideration,  
21      including information about the marketplace,  
22      information about the actual supply of the washing  
23      machines issue in this litigation and other  
24      information that relates to the marketplace  
25      generally.

1           Q           What did the Complaint tell you about  
2           the supply of these -- well, let me -- let me  
3           rephrase that.

4                       MR. DECKANT:   Actually, did you finish  
5           your prior answer?

6                       THE WITNESS:   We can move along.

7                       MR. DECKANT:   Okay.

8           BY MR. LOGAN:

9           Q           What did the Complaint tell you about  
10          the supply-side factors that affected the market  
11          price for these clothes washers?

12          A           Are we having a different discussion?  
13          Because I'm talking about the fact that Dr. Dennis  
14          considered those things.

15          Q           Okay.   Same question for Dr. Dennis.  
16          What did the Complaint tell Dr. Dennis about  
17          supply-side factors that -- that implicated the  
18          market price for these clothes washers?

19          A           I'm aware that it informed his  
20          opinions, his survey design and his conclusions, but  
21          you would have to ask him about the precise things  
22          that he considered.

23          Q           Are you aware of the term "focalism" as  
24          it is used in critiquing contingent analysis?

25          A           I would need greater context to

1 understand what that means.

2 Q Have you reviewed economic articles  
3 that discussed focalism within the context of  
4 contingent analysis?

5 A I've read a number of peer-reviewed  
6 studies of contingent valuation method, but I have  
7 no memory of focalism, at least as -- as you're  
8 saying it. There may be a different term that means  
9 the same thing, but --

10 Q Is there a focalism bias in the Dennis  
11 report?

12 A Not that I'm aware of.

13 Q Did you look?

14 A No.

15 Q I want to look at the results of the  
16 Dennis survey. I apologize. I'm not sure what page  
17 this is on. Page 18 of the Dennis report. That  
18 22 percent of respondents indicated that they would  
19 not purchase the non-Energy Star machine for any  
20 price.

21 A I'm sorry. I think I lost part of the  
22 question there. Can you ask it again, please?

23 Q Sure. Look at the first row of the  
24 table on page 18.

25 A Yes.



1           Q       When you say elicited dollar amount,  
2       zero?

3           A       Correct.

4           Q       And the percentage of total respondents  
5       that respond to zero is 22 percent.

6                   Do you see that?

7           A       I do.

8           Q       And the conclusion here is that  
9       22 percent of the respondents would not pay any  
10      amount for a non-Energy Star clothes washer?

11          A       I think that question is better  
12      targeted at Dr. Dennis.

13          Q       Do you have an opinion on that  
14      question? Do you have an answer for yourself?

15          A       I haven't formed an opinion on that  
16      topic one way or another. I would say that it's my  
17      understanding from my conversations with Dr. Dennis  
18      that he felt that at least some portion of the  
19      population would not buy these washing machines  
20      under any condition without an Energy Star logo. I  
21      make reference to that in my declaration.

22          Q       And so it's fair to say that for that  
23      percentage of the population the price premium for  
24      Energy Star would be 100 percent because they  
25      wouldn't take anything that wasn't an Energy Star

1 clothes washer?

2 A I'm sorry. What was the question  
3 again?

4 Q It would be fair to say, isn't it  
5 right, that for the -- that for that segment of the  
6 population, the 22 percent, that would not be  
7 willing to buy at any price, that the price premium  
8 for that segment of the population would be  
9 100 percent?

10 A I don't know whether that's fair or  
11 not.

12 Q Are you aware of a concept of stated  
13 versus revealed preference? Stated preference  
14 versus revealed preference?

15 A Yes. I think the easiest way to  
16 illustrate it would be that Dr. Dennis has conducted  
17 a stated preference survey, whereas Dr. Sukumar has  
18 conducted a revealed survey.

19 Q Do economists tend to prefer stated  
20 preference surveys or revealed preference?

21 A I believe both types of surveys are  
22 widely used.

23 Q And they are both equally valid, or is  
24 one better than the other generally?

25 A I don't think I would pass judgment

1 over one or the other. I think they are both valid  
2 techniques.

3 Q All right. Let's move on to the  
4 Sukumar report, which was previously marked as 3.  
5 And to clarify, for Exhibits 2 and 3, these were  
6 just the bodies of the report, not all of the  
7 exhibits due to the fact that many of the exhibits  
8 were Excel sheets and very difficult to print off in  
9 any way that was intelligible, so you'll have to  
10 forgive me.

11 A Before you ask your next question, can  
12 I get a sense of your timing because I may need a  
13 bio break before we continue, if this is going to be  
14 longer than, say, five to 10 minutes.

15 Q I think it will likely be longer than  
16 10 minutes. Why don't we --

17 A Do you mind if we take a break?

18 Q I've already rescheduled my flight, so  
19 that's fine.

20 A Okay.

21 VIDEO OPERATOR: It's approximately  
22 4:05.

23 We're going off the record.

24 (Brief recess.)

25 VIDEO OPERATOR: Okay. It's

1 approximately 4:13.

2 We're back on the record.

3 BY MR. LOGAN:

4 Q Now, in your previous round of  
5 testimony here, you characterize the Sukumar study  
6 as being an example of revealed preference; is that  
7 correct?

8 A Correct.

9 Q And tell me what about the Sukumar  
10 study renders an example of revealed preference.

11 A It makes use of conjoint analysis which  
12 is a revealed preference technique.

13 Q Every example of conjoint analysis is  
14 an example of revealed preference technique or only  
15 some?

16 A I guess I wouldn't say 100 percent, but  
17 I've never encountered a conjoint study that wasn't  
18 a revealed preference study. Maybe there is a  
19 stated preference study, but my understanding is  
20 that conjoint analysis generally, at least, is a  
21 revealed preference technique.

22 Q And I guess going back to my previous  
23 question, what about the conjoint analysis renders  
24 it a revealed preference technique?

25 A The alternating of choices, attributes,

1 rankings, the exercises that are done are not a  
2 direct request for information, but rather for data  
3 points that can be analyzed in order to understand a  
4 certain piece of information.

5 Q What is your level of familiarity with  
6 the ASEMAP method?

7 A I have an understanding generally of  
8 the way that it works. I've seen examples of how it  
9 works. I have reviewed several peer-reviewed  
10 studies of the technique, and I am aware that  
11 generally in the business marketplace that there are  
12 numerous corporate entities that rely on ASEMAP to  
13 help make business decisions.

14 Q ASEMAP is -- the software used by  
15 Dr. Sukumar is proprietary code, is it not?

16 A To the best of my understanding it is  
17 proprietary code.

18 Q Have you seen it?

19 A Literally the code? I mean, I've  
20 reviewed the ASEMAP tool, but no more than I've seen  
21 the software code for Microsoft Excel or for  
22 Sawtooth software or for SSI or for any other piece  
23 of software. I haven't seen the underlying  
24 programming of ASEMAP.

25 Q Have seen the underlying algorithms of

1 ASEMAP?

2 A I've seen them discussed in peer  
3 reviewed journals. But, again, the question is a  
4 bit nonsensical to me because we use software  
5 programs all the time without seeing the software  
6 code underneath them. I think that's pretty common.

7 Q Other than seeing the algorithms in  
8 peer-reviewed journals, do you have any other  
9 sources of information about the algorithms in --  
10 built into the ASEMAP software?

11 A I've also conversations with  
12 Dr. Sukumar about how the technique works, how  
13 it's -- how it's applied.

14 Q And by your previous answer about the  
15 peer-reviewed journal articles, are you referring to  
16 the article cited in the footnotes, especially  
17 Footnotes 1 through 3 of the Sukumar report?

18 A Well, I know I am not talking about  
19 Footnote 2 because that's a book that I've read.  
20 And it's not specific to ASEMAP. I would have to go  
21 back and look at my file to understand what articles  
22 I've read, but I do know that Srinivasan is one of  
23 the key peer-reviewed authors on the topic so these  
24 may be them, but I can't state with certainty.

25 I do -- I do remember Dr. Sukumar

1 talking extensively about a Srinivasan article in  
2 the Journal of Marketing Research, which is one of  
3 the top tier peer-reviewed journals in that  
4 industry.

5 Q And -- and Footnote 3 cites an article  
6 by Dr. Srinivasan from the Journal of Marketing  
7 Research. Do you see that?

8 A That's what I was referring to.

9 Q Have you read that article?

10 A Again, I would have to confirm with my  
11 files, but that's one of the articles, but I very  
12 well may have.

13 Q What are of the major criticisms of the  
14 ASEMAP system?

15 A I'm not aware of any criticisms of the  
16 ASEMAP system.

17 Q Are you aware of any criticism of the  
18 ASEMAP system?

19 A Again, I would need to go back and look  
20 at the literature that I've reviewed. As I sit here  
21 today, I don't have a recollection one way or the  
22 other.

23 Q Where did Dr. Sukumar get the  
24 respondents for his survey?

25 A I think that's a question probably best

1       levied to Dr. Sukumar. I can go through his report  
2       and try and pick out where he makes a statement  
3       about that, but as I sit here right now I don't have  
4       an immediate recollection.

5                       Would you like me to review the  
6       document?

7               Q       I -- if you don't have a recollection,  
8       that's -- that's fine, because it does say somewhere  
9       in this report.

10                    Do you know how many respondents took  
11       the survey that Dr. Sukumar used in this case?

12               A       Again, off the top of my head, I  
13       believe it was several hundred, but I don't recall  
14       the precise number. I assume the Sukumar  
15       Declaration speaks for itself, and he can speak to  
16       the number of respondents himself.

17               Q       And there was, in fact, a culling  
18       process that Dr. Sukumar used in order to reduce the  
19       number of respondents and he was culling them for  
20       various reasons that he was questioning the validity  
21       of their responses.

22                    Do you recall that?

23               A       I understand that at a high level.

24               Q       Do you know how many respondents  
25       Dr. Sukumar ended up with after the culling process



1 took place?

2 A Again, that's a number that I've known.  
3 Without reviewing his Declaration and materials, I  
4 don't have the precise number in mind, but I believe  
5 it was hundreds of respondents.

6 Q Was it less than 200? Do you know?

7 A It may have been. I don't recall  
8 precisely.

9 Q Is that troubling to you that the  
10 number of valid responses on the survey was less  
11 than 200, if, in fact, that is the case?

12 A Absolutely not. For other types of  
13 surveys it may be the case that you need hundreds,  
14 if not thousands, of respondents, but conjoint  
15 exercises are a unique type of survey that by asking  
16 consumers multiple questions to elicit their  
17 revealed preference diminishes the number of  
18 required respondents to get reliable results.

19 Q What is unique about conjoint analysis  
20 that you need less than other types of survey  
21 techniques in order to get a valid response?

22 A I think I just stated that by having  
23 multiple exercises as part of the survey, multiple  
24 either choices or tasks, you can have -- you can  
25 elicit greater information from a single respondent

1 and thus you need fewer respondents.

2 Q If you have extraordinarily good  
3 information about a small number of respondents,  
4 that's -- that's good enough, in your opinion?

5 A I mean, I think it's typical in a  
6 classic application of conjoint analysis to have as  
7 few as 20 or 30 respondents, maybe less. And that  
8 very good information can be derived by that  
9 exercise.

10 Q Are you aware that Dr. Sukumar has  
11 testified that the respondents here are  
12 representative of the putative class?

13 A That's my understanding, yes.

14 Q Do you know where his respondents were  
15 from geographically, where they live?

16 A Again, without reviewing his background  
17 materials, I'm not certain that I could recollect  
18 that right now.

19 Q Would it -- were you aware that the  
20 Sukumar survey used participants from other  
21 countries?

22 A I don't recollect that one way or the  
23 other.

24 Q If the Sukumar survey did, in fact, use  
25 participants from other countries, would that give

1     you pause about the validity of the results?

2             A           If it's his testimony that the results  
3     are projectable to the class, then no.

4             Q           Other than Dr. Sukumar's say-so, would  
5     you have reason -- let me -- let me take a step  
6     back.

7                         Other than Dr. Sukumar's say-so, would  
8     the fact that he included participants from other  
9     countries give you pause about the validity of the  
10    results?

11            A           Not without some other information.

12            Q           The goal of this -- of Dr. Sukumar's  
13    analysis was to acquire high quality information  
14    from respondents about their revealed preference for  
15    Energy Star clothes washers; is that right, at a  
16    high level?

17            A           My understanding of Dr. Sukumar's goal  
18    was to develop an estimate of the price premium paid  
19    by the class as a result of the Energy Star logo  
20    having been placed on the Maytag Centennial washing  
21    machines.

22            Q           That's what he was trying to calculate,  
23    but the means by which he tried to calculate that  
24    was to develop high-quality information from his  
25    respondents about their preference for Energy Star

1 clothes washers; isn't that accurate?

2 A I don't know that it is. You'd have to  
3 ask him. My understanding is that his goal was to  
4 do a conjoint exercise to determine the price  
5 premium.

6 Q So people who live in Iran are not part  
7 of the putative class, correct?

8 A I don't know that we can know that one  
9 way or the other.

10 Q People who live in India are not part  
11 of the putative class as moved for by the Plaintiffs  
12 in this case; isn't that right?

13 A I'm not certain that we can know that  
14 one way or the other.

15 Q People from Israel, same question.

16 A Again, I'm not certain that we can know  
17 that one way or the other.

18 Q People from Brazil?

19 A Same answer, I don't believe we can  
20 tell one way or the other whether any one individual  
21 member is a member of the class just by their  
22 present country of origin.

23 Q Would an analysis of people who live in  
24 Iran, their views of Energy Star clothes washers,  
25 would that be probative in this case?

1           A           I haven't made an independent  
2           evaluation of that one way or the other. You'd have  
3           to ask Dr. Sukumar.

4           Q           You can't tell just off the top of your  
5           head that the use of Iranians in Energy Star clothes  
6           washers is not relevant in this case?

7           A           Again, I would defer to Dr. Sukumar.

8           Q           Is Dr. Sukumar still an example of  
9           trying to find the consumers' willingness to pay for  
10          a particular product attribute?

11          A           I don't believe so, no.

12          Q           Is Dr. Sukumar still an example of  
13          trying to find the part-worth of a particular  
14          product attribute?

15          A           No, I don't believe so.

16          Q           So what is it that Dr. Sukumar was  
17          trying to accomplish?

18          A           My understanding of what Dr. Sukumar  
19          was trying to accomplish was to determine an  
20          estimate of the price premium that was paid by the  
21          class as a result of the Defendants' conduct of  
22          placing the Energy Star logo on the Centennial  
23          washing machines.

24          Q           Would it be surprise you to know that  
25          Dr. Sukumar has previously characterized this

1 methodology as trying to find willingness to pay?

2 A I need more information. What do you  
3 mean by "this methodology?" What is the context of  
4 that statement?

5 Q An ASEMAP conjoint analysis.

6 A That's all the information you can give  
7 me?

8 Q That in the context of an ASEMAP  
9 conjoint analysis Dr. Sukumar characterized that  
10 survey as trying to find the willingness to pay.

11 A I mean, it's just such woefully  
12 incomplete information I can't tell you anything  
13 about that statement. It certainly does not cause  
14 me concern based upon my reading of his Declaration  
15 and his deposition testimony where I understand that  
16 in this case he has had a different stated goal.

17 Q Does Dr. Sukumar put a dollar figure on  
18 the price premium that he calculates in this case?

19 A My understanding is that he puts a  
20 percentage figure on the price premium in this case.  
21 That's the one that I cite in my Declaration.

22 Q Why don't we look at page 7 of  
23 Dr. Sukumar's report where he states that the price  
24 premium for Energy Star logo is \$180.39 or  
25 44.3 percent of the average clothes washer price.

1 Do you see that?

2 A Yes.

3 Q Could the price premium for the Energy  
4 Star logo ever exceed 100 percent of the price  
5 premium of a clothes washer?

6 A I need more context to be able to  
7 answer that.

8 Q Using the ASEMAP methodology, is it  
9 possible that a product attribute could be  
10 responsible for more than 100 percent of the  
11 purchase price of a product?

12 A I'm not aware of that one way or the  
13 other.

14 Q In fact, that would be sort of a  
15 nonsensical idea because a price premium should not  
16 be -- cannot be more than 100 percent of the price  
17 of a product, otherwise the price would be higher?

18 A Are we talking about the variable of  
19 interest in a study here or an ancillary control  
20 variable?

21 Q I'm talking about the ASEMAP  
22 methodology -- well, let me -- let me take a step  
23 back.

24 Why don't we talk about price premium  
25 in general. Could a price premium, as you used the

1 word in your report, ever be more than 100 percent  
2 of the price of a product?

3 A I need more information to try and make  
4 that determination.

5 Q What information would you need?

6 A What product are we talking about --

7 Q The context of your report, so the  
8 clothes washers and price premium as you use it in  
9 this case. Sorry -- sorry to interrupt.

10 A I would need to know in what way the  
11 method was calculated. I would need to understand  
12 information about what went into that survey, how  
13 the survey or technique is intended to be applied to  
14 the facts and circumstances of the case.

15 Q Could a consumer pay an actual price  
16 premium of \$1,800 for a \$400 clothes washer?

17 A Again, I need more information to try  
18 and understand that information.

19 Q That would -- that would be a strange  
20 result, in your opinion?

21 A I can't evaluate whether it's strange  
22 or not without more context.

23 Q Dr. Sukumar -- Dr. Sukumar's underlying  
24 data cannot -- could be used to calculate the price  
25 premium for other product attributes other than



1 Energy Star because he evaluated several product  
2 attributes; isn't that correct?

3 A This is what I was getting at with my  
4 request for clarification before as to the variable  
5 of interest versus an ancillary control variable.  
6 Again, I'm going to defer to Dr. Sukumar about the  
7 ultimate calculations in his survey. However, in  
8 economics and statistical studies, it is often the  
9 case that you design a study with a particular goal.  
10 For example, in this case, to understand the value  
11 of the Energy Star. And you can have statistical  
12 techniques that provide you with a very accurate  
13 read on the variable of interest, the Energy Star,  
14 while not intending to give you a precise estimate  
15 for other variables that are included in the survey.

16 Q So it's your testimony that  
17 Dr. Sukumar --

18 A Sorry.

19 Q -- Dr. Sukumar accurately calculated  
20 the price premium for Energy Star but did not  
21 necessarily calculate the price premium for other  
22 product attributes?

23 A Again, I'm not going to speak for  
24 Dr. Sukumar on that subject, but you're raising the  
25 issue of you have an analysis that's been done and

1 that analysis has been done with a specific focus.  
2 Can you use that same analysis unadjusted for other  
3 purposes, and I'm telling you that based on my  
4 experience there are many types of analyses where  
5 the answer to that question is no, that if you  
6 wanted to understand a different attribute of the  
7 washing machine, for example, you would need to do a  
8 study that is focused on understanding that  
9 particular attribute. And that simply by  
10 controlling for certain attributes, you don't  
11 necessarily get a read on their value. And that  
12 that is a common and understood element of economic  
13 studies.

14 Q If one were to control for all product  
15 attributes, would it be possible to take a product  
16 to divide it into individual product attributes and  
17 then assign a percentage value to each product  
18 attribute?

19 THE WITNESS: Let me hear that back,  
20 please.

21 (At which time the following question  
22 was read back by the reporter:

23 "Question: If one were to control for  
24 all product attributes, would it be possible  
25 to take a product to divide it into individual

1 product attributes and then assign a  
2 percentage value to each product attribute?")

3 THE WITNESS: That question is too  
4 insufficient on the details for me to give you  
5 an answer.

6 BY MR. LOGAN:

7 Q When you are speaking about price  
8 premium in your report, is it your intention to look  
9 at all of the attributes of a clothes washer and  
10 decide what percentage of the value of the clothes  
11 washer is due to the Energy Star logo?

12 A That is the intention of the study.  
13 You are to understand the value that is isolated  
14 just as to that one attribute, the price premium  
15 that consumers paid for that one attribute.

16 Q Do you believe that Drs. Dennis and  
17 Sukumar have accurately identified the portion of  
18 the product value that is attributable to the Energy  
19 Star logo?

20 A I have not reanalyzed Dennis and  
21 Sukumar's surveys to make a 100 percent evaluation.  
22 I'm relying on their expertise in this case. I have  
23 done checks and reviews of their work to understand  
24 that at least their basic framework appears to  
25 comport with what I understand to be appropriate

1 techniques and find that to be true.

2 VIDEO OPERATOR: A little over 10

3 minutes.

4 BY MR. LOGAN:

5 Q So ignoring this last answer and going  
6 back to the previous one, we were discussing the  
7 idea of taking the product, dividing it into  
8 attributes and assigning a percentage to each  
9 product attribute. You -- you recall that?

10 A I do recall that question.

11 Q Good. Is it your testimony that if we  
12 did that for the clothes washers at issue in this  
13 case you would find that the Energy Star logo was  
14 somewhere in the neighborhood of 44 to 55 percent of  
15 the product value?

16 A Again, I'm having a really hard time  
17 understanding that question. I think maybe what  
18 you're trying to elicit here is, for example, would  
19 the results of the Sukumar study be additive? Could  
20 you add them all up and get the total price of the  
21 machine?

22 And I -- in most cases where you were  
23 trying to isolate the price premium of a single  
24 attribute while controlling for others, the answer  
25 is no. They're not intended to be additive. So I

1 wouldn't take the result of every attribute from the  
2 Sukumar study and add it up to try and get the total  
3 value of a washing machine. I would look only at --  
4 and this is the goal of the work that has been done  
5 here -- the value of the particular attribute -- I  
6 would say the goal is to isolate the premium that  
7 has been paid for the particular attribute while  
8 controlling for the surrounding attributes. And I  
9 believe that Dr. Dennis and Dr. Sukumar understood  
10 that goal and acted to achieve that goal.

11 Q Now, I'm going to point you to a  
12 paragraph in your report under the supply-side  
13 considerations where you note that in your opinion  
14 Dr. Sukumar has considered and accounted for  
15 supply-side factors in the determination of his  
16 price premium calculation.

17 Do you see that?

18 A I do.

19 Q And you had a footnote to Sukumar  
20 report at 6. First let me ask you a question, as  
21 long as we have these two pages here: With respect  
22 to the -- the phrasing of your opinion here, you say  
23 I understand that Dr. Dennis accounted for  
24 supply-side. I understand that Dr. Sukumar has  
25 accounted for supply-side.

1 Did you make your own determination  
2 that Drs. Dennis and Sukumar definitely accounted  
3 for supply-side factors, or you were simply relying  
4 on their reports and so you -- it has been reported  
5 to you, you understand, that Dr. Dennis and  
6 Dr. Sukumar accounted for supply-side?

7 A I haven't independently verified every  
8 use of supply-side factors, but I have verified the  
9 use, for example, of the retail pricing and the  
10 average price points in both the Sukumar and the  
11 Dennis surveys and I've satisfied myself that at  
12 least as to those issues that they've raised in  
13 their own declarations, they adequately controlled  
14 for supply-side factors.

15 Q Is there information on page 6 of the  
16 Sukumar report that you would characterize as being  
17 a supply-side factor?

18 A The citation that I make to page 6 I  
19 think relates to the first paragraph of the page  
20 where Dr. Sukumar testifies, quote, "I also took  
21 supply-side considerations into account when  
22 designing my survey by examining actual sales data  
23 and advertising circulars from retailers who saw the  
24 Maytag Centennial clothes washing machines to  
25 determine the price paid by actual consumers."

1                   And then he also references his lists  
2                   of materials considered, which I don't have in front  
3                   of me right now, or at least I'm not looking at, but  
4                   I believe may contain other supply-side elements.  
5                   He's also looked at the market for clothes washing  
6                   machines more generally and has addressed the types  
7                   of attributes that are available to consumers at  
8                   various price points. Again, considering the supply  
9                   of available washing machines with different  
10                  features in the marketplace.

11                Q           Other than what is contained here in  
12                your previous answer and then in the list of  
13                materials considered cited by Dr. Sukumar, is there  
14                any other indication to you that Dr. Sukumar  
15                considered supply-side factors?

16                A           Again, he confirmed to me that he  
17                actively considered supply-side factors in his  
18                analysis. I believe he testified to that at his  
19                deposition. You would have to ask him for greater  
20                detail about all the ways in which he may have made  
21                adjustments for the supply-side, but I cite  
22                paragraph 6 as an example where he clearly testifies  
23                that he has considered and included supply-side  
24                considerations in his analysis.

25                Q           I want to look at paragraph 46 of your

1 report which starts, "I've also considered  
2 supply-side factors in my determination of damages."

3 And you go on to discuss the quantity  
4 supplied in the rest of this paragraph. Let's  
5 pretend for a minute that I am a simple country  
6 lawyer from the Rocky Mountains. Could you explain  
7 what you were trying to say in paragraph 46?

8 A It's my experience that occasionally  
9 simple country lawyers from various locations  
10 confuse the economic underpinnings of various  
11 different types of studies, and in this paragraph,  
12 one of the goals that I have is to distinguish  
13 between types of cases where a determination may be  
14 need -- may be needed to be made as to supply under  
15 different conditions than actually took place.

16 For example, if you were to look at --  
17 generally at the Apple versus Samsung actions where  
18 Apple and Samsung accuse each other of having stolen  
19 intellectual property, those analyses need to figure  
20 out and compare in reality so many units were sold  
21 by Apple and so many units were sold by Samsung. If  
22 Samsung didn't violate Apple's intellectual  
23 property, how many units would Apple actually have  
24 sold?

25 And that is very different in my mind



1     than a case like this where the historic sales of  
2     the product are a known fact and are not subject to  
3     change. We're not talking about a situation where  
4     Joe Six Pack, a class member, is suddenly deemed to  
5     have not actually purchased his washing machine.  
6     All those sales took place, and we are not trying to  
7     figure out how sales may have transited to another  
8     company. We're looking at historical facts, actual  
9     sales, which, as I state elsewhere in this document,  
10    I do not believe there is a dispute as to the total  
11    of the sales that are at issue in this litigation.

12                 And the Atlanta Matt case to me is a  
13    similar issue. You have one company that issues an  
14    advertisement that another says it's injurious to  
15    its business. And so you have to figure out in that  
16    type of case how might business have been different  
17    as a result of that advertising. And, again, that's  
18    different here because the total number of units at  
19    issue, the total sales of those products, is not in  
20    dispute. It's a historical fact.

21                 Q         If I'm -- if I'm interpreting this  
22    correctly you are not interested in conducting any  
23    sort of counterfactual analysis that would try to  
24    estimate how many of the clothes washers at issue in  
25    this case would have been sold but for the allegedly

1 fraudulent Energy Star logo?

2 A And I don't do that for the reasons set  
3 forth in paragraph 46, which is that the -- the only  
4 way to establish damages for people who in some sort  
5 of counterfactual would not have purchased the  
6 Energy Star would be to offer them a full refund  
7 rather than the price premium. And by offering, in  
8 my damage calculation to include only the price  
9 premium, I wind up with what can only be an  
10 inherently conservative measure.

11 Q So the but-for world of what would the  
12 market have charged for these clothes washers had  
13 the Energy Star logo not been there, that is not  
14 part of your analysis?

15 A That's correct. I'm looking only at  
16 the price premium that actual class members have  
17 actually paid in the marketplace as a result of the  
18 Energy Star certification having been made when it  
19 should not have been made.

20 VIDEO OPERATOR: Sorry. Four minutes.

21 BY MR. LOGAN:

22 Q How can we know the price premium that  
23 was actually paid by consumers in this case if we  
24 don't know what would -- what they would have made  
25 had the logo not been there?

1           A           That question seems a little bit  
2           nonsensical. How can we know it? Whirlpool has  
3           made a determination of what consumers made.  
4           Dr. Sukumar made a determination of what consumers  
5           pay. Dr. Dennis has made a determination of what  
6           consumers paid. There could be a number of any  
7           other ways to do that, but those determinations are  
8           easily made using the techniques that are at issue  
9           in this litigation.

10          Q           Let's look at paragraph 47 where you  
11          say if we were with were to assume arguendo that  
12          Defendant would not have lowered its price in  
13          concert with demand. With that particular phrase,  
14          what is the concept you're trying to get at?

15          A           I've seen arguments in other cases  
16          where a party makes the argument that we just  
17          wouldn't have done what you say might have happened,  
18          and I don't find that to be an economically  
19          compelling argument both because of the obvious  
20          conflict of interest in the timing of when those  
21          comments are made and the finding, for example, of  
22          exercises like the Dennis survey that show a  
23          different marketplace outcome.

24          Q           Let's look at paragraph 48. It is also  
25          an economic perversion for a defendant engaged in a

1 litigation with conflict of interest to simply state  
2 that "it would never have adjusted its price or  
3 would not have adjusted them enough so as to meet  
4 demand."

5 This sounds to me like some sort of  
6 possible counterfactual scenario where we are  
7 imagining what the price would have been without the  
8 Energy Star logo. Is that what you were trying to  
9 get at?

10 A Again, this is a peremptory discussion.  
11 I don't believe we need a counterfactual examination  
12 in this case to understand the price premium that  
13 consumers actually paid. I've seen arguments again  
14 that suggest that if you were to go back in time and  
15 take the label off the washing machines, which is  
16 something we can't do, that Defendant states that it  
17 would behave in one way or another. And what I'm  
18 suggesting is that, A, that exercise is not  
19 necessary; B, because of the conflicts of interest,  
20 taking the party's word for it as opposed to seeing  
21 some hard evidence is a perversion of an economic  
22 study because you're not looking at some actual  
23 outcome, and that it is an unlikely outcome as I've  
24 described here.

25 Q Was there a price war in 2009 and 2010

1 between manufacturers of top-loading Energy Star  
2 clothes washers that caused the price of those  
3 clothes washers to go down to very low levels as  
4 compared with other clothes washers?

5 A I'm sorry. I'm going to have to hear  
6 that back again.

7 Q Was there a price war in 2009 and 2010  
8 between makers of Energy Star top-loading clothes  
9 washers? I'll just leave it at that.

10 A I'm not aware one way or the other.  
11 That's not material to the damage methodologies that  
12 I've set forth here in my report.

13 Q It -- that doesn't matter to you at  
14 all, does it?

15 A It doesn't matter because we have the  
16 actual retail sales transactions for the washing  
17 machines at issue here.

18 Q What do the actual retail sales of the  
19 washing machines at issue here tell you about any  
20 price war that might have taken place between  
21 manufacturers between 2009 and 2010?

22 A That's not a part of my assignment in  
23 this case of the studies that I've done and it's  
24 immaterial to the damage calculations, so I haven't  
25 made an endeavor to understand that.

1           Q       No, but you testified you didn't need  
2       to know about that because you have the actual  
3       retail sales, and I'm asking for that connection.  
4       What is the connection between the actual retail  
5       sales data which you do have and the price war that  
6       occurred in 2009 which you haven't looked at?

7           A       Well, first of all you've just put  
8       words in my mouth that I've agreed that there's a  
9       price war, whatever that means. What I'm telling  
10      you is that the prices that consumers paid for these  
11      washing machines are what they paid. We have that  
12      actual data. So we don't need to conduct an  
13      analysis to try and guess at what consumers paid.  
14      We have the actual retail transactions that tell us  
15      what the average price was that consumers paid.

16          Q       Isn't it possible that -- that even if  
17      the market -- let me see if I can rephrase this.

18                   Even if a price premium did exist  
19      within a given marketplace if there was then intense  
20      competition over that price -- over that attribute  
21      that caused the price premium that then the price  
22      premium actually charged to customers for that  
23      attribute would decrease?

24          A       Boy, I'm going to think about that and  
25      probably hear that question back. It was a little

1 convoluted for me.

2 Q If a price premium for a particular  
3 attribute did exist within a marketplace and then  
4 there was intense competition between suppliers over  
5 that attribute, isn't it possible that the price  
6 premium charged by the marketplace would decrease as  
7 a result of that competition?

8 A Again, we don't need to surmise about  
9 that because we have the actual retail prices that  
10 consumers actually paid.

11 MR. LOGAN: I think we're -- I think  
12 I'm done.

13 MR. DECKANT: First of all, I'd like to  
14 the opportunity to review and correct pursuant  
15 to Rule 30E. And I would also, right now,  
16 like the opportunity for a limited redirect of  
17 Mr. Weir. But first I would like to take a  
18 short break so I can collect my thoughts.

19 VIDEO OPERATOR: It is approximately  
20 4:51. At this point we're going to end  
21 Videotape Number 3 in today's deposition of  
22 Mr. Colin B. Weir on Friday, April 22, 2016.

23 (Brief recess.)

24 VIDEO OPERATOR: Okay. We are back on  
25 the record.

1           The time is approximately 5:05 p.m.,  
2           and this will begin Videotape Number 4 in  
3           today's deposition of Mr. Colin B. Weir, on  
4           Friday, April 22, 2016.

5           MR. DECKANT: I'd like to ask the court  
6           reporter to mark as Exhibit 10, a document  
7           that was previously marked as Exhibit 39 at  
8           the deposition of J.B. Hoyt on August 12,  
9           2015.

10           (Document Wdz00012524 - Wdz0012524 was  
11           marked Weir-10 for identification.)

12           (Off-record discussion.)

13       BY MR. DECKANT:

14           Q       Mr. Weir, do you have a copy of  
15           Exhibit 10?

16           A       I do.

17           Q       Can you please turn to the page on  
18           Exhibit 10 ending in -- you know what, actually,  
19           strike that.

20                    Could you please turn to the second  
21           page of Exhibit 10 with the Bates number Wdz0012526.

22           A       I'm there.

23           Q       Okay. Do you recognize this document  
24           as the test data commissioned by the DOE of the  
25           washers at issue in this case?



1           A           Yes.

2           Q           And this is the test data that the DOE  
3           relied upon when it decided to refer the matter to  
4           the EPA for potential disqualification, correct?

5           A           Yes.

6           Q           Now, could you please turn to the page  
7           ending in Bates number WDZ0012540?

8           A           Okay. I'm there.

9           Q           Mr. Weir, have you heard of the term  
10          "fill level 3"?

11          A           I have.

12          Q           Do you understand the term fill level 3  
13          to be -- strike that.

14                    Are you aware that in 2010 the U.S.  
15          Department of Energy issued an interpretive rule  
16          that fill level 3 was the appropriate place to  
17          measure the capacity of a top-loading washers for  
18          the purpose of Energy Star certification?

19          A           I understand that, yes.

20          Q           Okay. And do you see on the page  
21          ending in Bates number 540 it states in the second  
22          full paragraph, "For the Stage 2 tests Springboard  
23          tested capacity at the same fill level used in the  
24          Stage 1 test marked as B in figure 1, which is  
25          slightly higher than fill level 3 as defined in the

1 current interpretive rule on the DOE website, i.e.,  
2 the highest point of the inner most diameter of the  
3 top cover as shown in Figure 1."

4 Do you see those words?

5 A I do.

6 Q So the text of this document states  
7 that Springboard, which the DOE commissioned, tested  
8 the capacity of these washers at a higher level than  
9 fill level 3, right?

10 A Yes.

11 Q What is the import of the decision to  
12 measure the capacity above fill level 3?

13 A All else equal, when the capacity of a  
14 washing machine increases, it will appear more  
15 efficient. And so the results of the Springboard  
16 study, vis-a-vis the Department of Energy's rules,  
17 are conservative and had Springboard measured the  
18 capacity at fill level 3 as they state in this  
19 document, the apparent failure of the Energy Star  
20 certification would be even worse than they conclude  
21 in this study.

22 Q Now, let me -- let me parse that out a  
23 little bit. Capacity is an input to the measurement  
24 of modified energy factor and water factor, right?

25 A Correct.

1           Q           And the MEF and WF as we've been  
2     discussing help determine the cut offs for whether  
3     or not a top-loading washer is Energy Star  
4     qualified, correct?

5           A           Correct.

6           Q           So if all else being equally I believe  
7     you stated -- if all else being equal the capacity  
8     is higher than otherwise a washer would appear to be  
9     more efficient, correct?

10          A           That's correct.

11          Q           So is it your opinion that by measuring  
12     above fill level 3 Springboard is actually  
13     conducting a test that is, in fact, more  
14     conservative than had they measured at fill level 3?

15          A           It's not only my opinion, it's the  
16     opinion of Springboard as they state here in the  
17     report.

18          Q           And we see that in the next paragraph  
19     down; right? It says, "If the capacity had been  
20     measured per the interpretive rule, namely at fill  
21     level 3," I'm continuing now, "we expect that the  
22     tests that MEF and WF would have been worse than the  
23     values measured during the stage 2 tests. Therefore  
24     we believe that the DOE can conclude firmly that  
25     this model is not compliant with Energy Star

1 specifications."

2 Do you see that?

3 A I do.

4 Q Do you have any basis to disagree with  
5 that?

6 A No. It's a matter of basic math that,  
7 as capacity increases, all else equal, a washer will  
8 appear situation.

9 Q So earlier -- I am going to paraphrase  
10 this poorly, but earlier in this deposition, do you  
11 recall that Mr. Logan asked you a question whether  
12 you were aware that the DOE's commission testing  
13 acknowledged that they tested the washers at the  
14 incorrect fill level?

15 Do you recall hearing a question like  
16 that?

17 A I remember that line of questioning. I  
18 think the words Mr. Logan used caused me to think of  
19 something other than this document, because this  
20 document indicates a conservative analysis in a way  
21 that I think is appropriate for our analysis in this  
22 litigation, and I interpreted his comments to  
23 suggest something else perhaps that Springboard had  
24 done an analysis that was less conservative. But  
25 that turns out to not be the case, at least to the

1 best of my understanding.

2 Q So does this deviation give you any  
3 concern as to the veracity of your opinion?

4 A No. My opinions remain unchanged.  
5 This only bolsters the conclusion that I've provided  
6 conservative estimates of damages in this case.

7 Q Okay. You can set Exhibit 10 aside.  
8 Now please take out Exhibit 1, your  
9 report, and please turn to page 6 where Table 2  
10 appears.

11 A I'm there.

12 Q Okay. Now, do you recall earlier in  
13 this deposition there was a line of questioning  
14 where you indicated that there may be some clerical  
15 errors on Tables 2 through 4 in your expert report?

16 A Yes, I believe the fourth column in the  
17 tables, or the third column of data, the one under  
18 the heading Additional Energy Expense contains  
19 typographical errors.

20 Q So in Table 2, you stated that there's  
21 a typographical error for the water in the -- in the  
22 column entitled Additional Energy Expense, correct?

23 A That's right.

24 Q So I'd like to walk through your  
25 calculations here. So as originally stated on

1 page 6, the additional energy expense for water in  
2 Table 2 is \$12.70, correct?

3 A That's what's in the table, but that  
4 number is a typographical error.

5 Q Sure. Now let's take a look at  
6 Exhibit 3.

7 A I'm at Exhibit 3 to Deposition Weir-1.

8 Q Now, do you see perhaps three-quarters  
9 of the way down the page in the section concerning  
10 water it says energy expense damages, \$45.62.

11 Do you see that?

12 A I see that, and this is the section of  
13 my workpapers that calculates the damages associated  
14 with additional water usage.

15 Q Now, how did you arrive at that figure  
16 of \$45.62?

17 A That is a multiplication of the  
18 722-gallon difference that I have calculated  
19 elsewhere by roughly 6.3 cents cumulative average  
20 cost per gallon over the life of the washing machine  
21 that I calculate, and that number is also present on  
22 this workpaper. So in my workpaper, the numbers are  
23 calculated in Excel to greater detail. But roughly  
24 6.3 cents times 722 gallons will give you the \$45.62  
25 that my workpaper determines to be the energy

1 expense damages per washing machine as it relates to  
2 water usage.

3 Q So should that \$45.62 figure, should  
4 that be the figure in Table 2 under the column  
5 Additional Energy Expense in the row Water?

6 A That's right. 45.62 is the correct  
7 figure to be placed in that column.

8 Q Now, what happens if we take the number  
9 of units in the second column, namely 430,108, and  
10 then multiply that by the additional energy expense  
11 with the clerical error fixed of \$45.62, what's the  
12 result of that calculation?

13 A It should be accounting for rounding  
14 error \$19.6 million, as I've shown in the final  
15 column in this table.

16 Q So in the context of Table 2, once this  
17 clerical error is updated with the correct figures  
18 in Exhibit 3, this doesn't actually change your  
19 total energy expense damages calculation in Table 2,  
20 right?

21 A It doesn't.

22 Q Now, let's turn the page to page 7.

23 A Okay.

24 Q And here in Table 3 under the row  
25 entitled Water and under the column Additional

1 Energy Expense, again we see the \$12.70 figure,  
2 right?

3 A Again, that 12.70 is a typographical  
4 error, but yes, I see it there in the table.

5 Q And just as we've been discussing and  
6 just as we've walked through in Exhibit 3, that  
7 should be \$45.62?

8 A Yes, from the same source, Exhibit 3 to  
9 my Declaration.

10 Q Again, if we multiply 430,108 times  
11 \$45.62 for water, we arrive at the total energy  
12 expense damages for water of approximately  
13 19.6 million, accounting for rounding, right?

14 A That's correct. And that's the number  
15 that is reflected in my analysis here in this table  
16 already.

17 Q So yet again this clerical error  
18 doesn't alter the total energy expense damages you  
19 calculate in Table 3, correct?

20 A You are correct. It makes no  
21 difference, the typographical error makes no  
22 difference to my final determination of damages.

23 Q Now let's turn the page to Table 4 on  
24 page 8.

25 A Page 8, Table 4, I'm there, yes.



1           Q           And yet again we see the same clerical  
2 error in the row entitled Water in the column  
3 entitled Additional Energy Expense, correct?

4           A           That's correct.

5           Q           And yet again as that pertains to the  
6 calculation of total energy expense damages, your  
7 figure of approximately 19.6 million is borne out by  
8 multiplying 430,108 units by \$45.62, correct?

9           A           Right. Again, that's all the  
10 information that's reflected in my Exhibit 3  
11 workpapers. The 430,000 times the \$45 figure gets  
12 the 19.6 million that's already here in the table.  
13 That number is correct and remains unchanged.

14          Q           Now, let's briefly talk about the  
15 additional energy expense for electricity in  
16 Table 4.

17                       Actually, going back to Table 3 for a  
18 moment, at times you've used \$22.09 for additional  
19 energy expense as we see in Table 3, and then  
20 looking at Table 4 -- you know what, actually,  
21 strike that.

22                       Right. So let's actually look at  
23 Table 2 on page 6.

24          A           Okay.

25          Q           Under the column entitled Additional

1 Energy Expense and the row entitled Electricity, we  
2 see a figure of \$42.30, right?

3 A I see that, yes.

4 Q All right. And turning to Table 3 on  
5 the next page under Additional Energy Expense under  
6 Electricity, we see a figure of \$22.09, right?

7 A That's correct.

8 Q So why do you use \$22.09 in Table 3 yet  
9 you use 42.30 in Table 2?

10 A Table 2 reflects a calculation of  
11 damages under the strict testing guidelines which  
12 calculates everything in kilowatt hours. And it  
13 assumes that the energy used by the machine to power  
14 the machine itself, plus the energy used by the  
15 washing machine to obtain hot water is obtained from  
16 electrical sources.

17 Table 3 is designed to examine a  
18 scenario wherein all of the machines obtain the  
19 power necessary to operate the machine itself from  
20 an electrical source, but all of the energy  
21 necessary to heat water for use in the machine via a  
22 natural gas water heater. And so there is simply  
23 less electricity used by the machine in Table 3  
24 because it's substituting natural gas as an energy  
25 source for part of the energy used by the machine.

1           Q           So now let's look at Table 4 on page 8.  
2           Under the column entitled Additional Energy Expense  
3           in the first row labeled Electricity, we see a  
4           figure of \$22.09, right?

5           A           Again, that's a typographical error in  
6           that row, but that is what the document says right  
7           here.

8           Q           And per your prior explanation to my  
9           last question, it should have been 42.30 as we see  
10          in Table 2, right?

11          A           Right. There are -- just so the record  
12          is clear, there are two rows labeled Electricity in  
13          Table 4 on. The first row where the annual energy  
14          use difference is 31 kilowatt hours, that additional  
15          energy expense number of 22.09 is a typographical  
16          error and should reflect the number that's in  
17          Table 2, \$42.30.

18          Q           Thank you.

19                      Now, so if -- if we take a look at  
20          Table 4 and we take a look at the first row entitled  
21          Electricity and the column titled Additional Energy  
22          Expense, if we changed that clerical error of \$22.09  
23          to the correct figure of \$42.30, that's the  
24          appropriate change, right?

25          A           That's the appropriate change. And,

1 again, that information is reflected correctly in my  
2 workpapers which are attached to the Declaration as  
3 Exhibit 3.

4 Q And just for the sake of the record, if  
5 we take the number of units reported in that same  
6 row, 177,819, and we multiply that figure by \$42.30,  
7 we arrive at approximately \$7.5 million, correct?

8 A Yes, that's correct.

9 Q And that's the same figure reported in  
10 the column entitled Total Energy Expense Damages,  
11 correct?

12 A That's correct. The only typographical  
13 error was under the Additional Energy Expense  
14 number. The calculation from the Energy Expense  
15 Damages was correct from the start.

16 Q So --

17 A Right.

18 Q -- in Tables 2 through 4, to summarize,  
19 do you agree that these clerical errors did not  
20 actually impact your total energy expense damages  
21 calculations?

22 A I agree they do not impact the total  
23 energy expense damages as I set forth in these  
24 tables.

25 Q And calculations these are laid out

1 properly in Exhibit 3 to your report, correct?

2 A That's correct.

3 MR. DECKANT: I have no further  
4 questions.

5 BY MR. LOGAN:

6 Q Could I ask a few questions about this  
7 Exhibit 10?

8 A Yes.

9 Q On page 12540 of Exhibit 10 Mr. Deckant  
10 had pointed you to that earlier, do you see the  
11 second bullet point on that page where it says  
12 "Consistent with the most recent RCW Guidelines,  
13 Version 3, 5/19/2010, that DOE approved for Energy  
14 Star testing"?

15 A I see that here.

16 Q Okay. And Mr. Deckant asked you your  
17 understanding of fill level 3 as used in the context  
18 of -- of this document. You remember that?

19 A Yes.

20 Q What is your understanding of what fill  
21 level 3 is?

22 A It is the point in the washing machine  
23 to which it should be filled to determine its  
24 capacity.

25 Q And when did fill level 3 become the

1 official DOE standard for Energy Star testing?

2 A Off the top of my head I don't recall,  
3 but it may possibly be the date that's shown here in  
4 this document.

5 Q Below that bullet point it says, "If  
6 the capacity had been measured per the interpretive  
7 rule, we expect the tested MEF and WF would have  
8 been worse than the values measured during the Stage  
9 2 test."

10 Do you see that?

11 A Yes.

12 Q By "interpretive rule" in that  
13 sentence, do you take that to mean fill level 3 had  
14 they -- let me rephrase.

15 Had they measured the capacity to fill  
16 level 3 per the interpretive rule the test results  
17 would have been worse?

18 A Yes, that's my understanding of that  
19 text.

20 Q Because the phrase "interpretive rule"  
21 here they are talking about their enactment of fill  
22 level 3. And, in fact, if you look at the caption  
23 to the picture on this page, it says "fill level 3  
24 per the DOE interpretive rule."

25 A That's what that caption says.

1           Q           Okay. So at the time that this testing  
2           took place, which was in either late 2010 or early  
3           2011, fill level 3 was the DOE standard for the  
4           measurement of capacity in top-loading clothes  
5           washers; is that correct?

6           A           That's my understanding, yes.

7           Q           Why did Springboard not test the  
8           clothes washers to fill level 3?

9                       MR. DECKANT: Objection.

10                      THE WITNESS: You would have to ask the  
11           people at Springboard that question.

12           BY MR. LOGAN:

13           Q           Fill level 3 was the standard and yet  
14           they did not measure capacity to fill level 3, did  
15           they?

16           A           Again, they made what they believed was  
17           a conservative choice in the -- in the measurement  
18           here.

19           Q           Do you believe this was an accident or  
20           it was intentional that they did not measure to fill  
21           level 3?

22                      MR. DECKANT: Objection.

23                      THE WITNESS: Based upon their  
24           description of what they've done, it certainly  
25           does not sound like an accident.

1 BY MR. LOGAN:

2 Q But you're speculating; is that right?

3 A That's my interpretation of this  
4 document.

5 Q But you don't know for sure what their  
6 intention was?

7 A It's my interpretation of the document.

8 Q It -- it's hard to see on this copy  
9 because it's black and white, it's a little bit  
10 fuzzy, but there are markers at various fill levels  
11 according to Springboard in this graphic.

12 Do you see that?

13 A As you said, this is -- I'm usually  
14 very good at being able to read these things, but I  
15 think I can see some indications here, but this  
16 is -- it's very hard to see.

17 Q Could you identify where fill level 3  
18 is on this graphic, not according to what's labeled  
19 here, but according to what your interpretation of  
20 what fill level 3 is?

21 A I believe it's the higher -- highest  
22 point of the inner-most diameter, and I think  
23 actually there is sort of an arrow pointing to  
24 that -- the letters "DOE" to the left --

25 Q And so --



1           A           -- on this graphic.

2           Q           You agree with Springboard that fill  
3 level 3 is as indicated on this graphic?

4                   MR. DECKANT: Objection, lack of  
5 foundation.

6                   THE WITNESS: I haven't made an  
7 independent evaluation one way or the other.

8 BY MR. LOGAN:

9           Q           Are you aware of fill level 4 -- of  
10 what fill level 4 is generally?

11          A           I'm less familiar with where it is in  
12 the washing machine. I know that it is higher than  
13 fill level 3 and that it is above the Department of  
14 Energy's guidelines for where capacity should be  
15 determined.

16          Q           The phrase that you and the counselor  
17 made several times during your back-and-forth was  
18 "all else equal," all else equal when the capacity  
19 of the washer increases the clothes washer would  
20 appear to be more efficient.

21                   Do you -- do you recall testimony along  
22 those lines?

23          A           Yes.

24          Q           What did you mean by the phrase "all  
25 else equal"?

1           A           If you had two washing machines that  
2           were different in different respects and had  
3           different energy consumptions and they were  
4           different sizes, you couldn't necessarily know what  
5           the impact of a change in capacity might be. So if  
6           you increase capacity, but then also changed other  
7           elements without other information, the analysis may  
8           not be dispositive. When you have one washing  
9           machine and there are no changes in that washing  
10          machine, the mathematical formulas used by the DOE  
11          will result in more favorable energy efficiency  
12          measurements if the measurement of the capacity is  
13          higher.

14          Q           Great. Is all else equal a sound  
15          assumption in this case? In other words, did any of  
16          the inputs change other than capacity?

17                   MR. DECKANT: Objection.

18                   THE WITNESS: My understanding is that  
19          all of the Centennial washing machines at  
20          issue in this case are identical in terms of  
21          an energy efficiency standpoint, and so the  
22          use of one Centennial washing machine versus  
23          another, there are -- those should have  
24          identical configurations. And so the change  
25          in the measurement of capacity would result in

1 an increased measurement of efficiency for the  
2 Centennial washing machines.

3 BY MR. LOGAN:

4 Q Let me -- let me get at this a slightly  
5 different way. If capacity is measured to fill  
6 level 3, how does that impact how the test is  
7 conducted in terms of how much cloth is put in to  
8 run the test?

9 MR. DECKANT: Objection.

10 THE WITNESS: The washing machine is  
11 filled to its capacity.

12 BY MR. LOGAN:

13 Q And therefore a higher capacity  
14 measurement, say, for example, to fill level 4,  
15 would result in even more cloth being put in the  
16 clothes washer for the purpose of running the test?

17 A That would depend on the regulations  
18 governing the test.

19 Q I'll represent to you that that is, in  
20 fact, the case. How did this -- how would this  
21 clothes washer react to being filled with cloth up  
22 to fill level 4 versus fill level 3?

23 A I don't understand that question.

24 Q If there's a different amount of cloth  
25 put in the clothes washer at a measurement to fill

1 level 3 than there is to fill level 4, how does the  
2 change in the amount of cloth impact the energy and  
3 water consumption of the clothes washer?

4 A My understanding based upon the  
5 Springboard tests, and they state here, is that had  
6 they run the tests with the higher capacity, the  
7 test values would have been worse regardless.

8 Q Is it your understanding that had  
9 Springboard run the test to fill level 4, that these  
10 clothes washers still would have failed to meet  
11 Energy Star?

12 A That's my reading of this document.

13 MR. LOGAN: Okay. That's it.

14 VIDEO OPERATOR: Okay. The time is now  
15 approximately 5:32, and this will end today's  
16 videotaped deposition of Mr. Colin B. Weir on  
17 Friday, April 22, 2016. We are off the  
18 record.

## C E R T I F I C A T I O N

I, LISA FORLANO, a Certified Realtime Reporter, Certified Court Reporter and Notary Public, do hereby certify that I reported the deposition in the above-captioned matter, that the said witness was duly sworn by me; that the foregoing is a true and correct transcript of the stenographic notes of testimony taken by me in the above-captioned matter.

I further certify that I am not an attorney or counsel for any of the parties, not a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.



LISA FORLANO, CRR, CCR #XI01143

DATED: April 25, 2016

1 ATTACH TO DEPOSITION OF: Colin B. Weir  
2 IN THE MATTER OF: Dzielak vs. Whirlpool  
3 DATE TAKEN: April 22, 2016  
4 Job No. CS2236911

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April 25, 2016

Economics & Technology, Inc.  
One Washington Mall - 15th Floor  
Boston, Massachusetts 02108

Case Name: Dzielak, Et Al. v. Whirlpool Corporation  
Veritext Reference Number: 2236911

Witness: Colin B. Weir                      Deposition Date: 4/22/2016

Dear Sir:

Enclosed you will find a transcript of your deposition.  
As the reading and signing have not been expressly  
waived, please review the transcript and note any  
changes or corrections on the jurat/errata sheet  
included, indicating the page, line number, change and  
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you are signing under penalty of perjury and forward  
the errata sheet back to us at the address shown above

If the jurat is not returned within thirty days of your receipt of  
this letter, the reading and signing will be deemed waived.

Sincerely,

Production Department

Encl.

Cc: Cedric Logan, Esq.  
Neal J. Deckant, Esq.

[&amp; - 25]

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[8 - agree]

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

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THE ABOVE RULES ARE CURRENT AS OF SEPTEMBER 1, 2014. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.



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COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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